Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 243.

LYDIA BRADLEY, PLAINTIFF IN ERROR,

v.

H. W. LIGHTCAP, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OF THE CASE.

On July 13, 1895, the defendant in error, H. W. Lightcap, commenced five ejectment suits in the circuit court of Mason County, Illinois, against tenants of plaintiff in error, Lydia Bradley, to recover the land in controversy, which is situated in Mason County. On motion of the defendants in the ejectment suits, the venue in all the cases was changed to Fulton County.

After the change was made, Mrs. Bradley was substituted as defendant in each case, and by agreement of the parties, the five suits were consolidated under the title of H. W. Lightcap, *v.* Lydia Bradley.

At the March term, A. D. 1896, of the Fulton County Circuit Court, jury was waived, and the cause tried by the court, who found the defendant not guilty, and rendered judgment against the plaintiff for costs, from

which finding and judgment, the plaintiff Lightcap, appealed to the Supreme Court of Illinois. On that appeal, the case was three times argued before the court, and on October 19, 1900, the Supreme Court of Illinois filed its opinion, reversing and remanding the cause. The case will be found reported in 186 Ill., 510 to 537.

The remanding order was filed and the case redocketed in the Fulton County Circuit Court at its January term, 1901.

At the May term, 1901, of said court, the cause was again tried with the intervention of a jury, and upon the completion of the evidence, the trial court, on plaintiff's motion, directed the jury to return a verdict in favor of plaintiff, which was accordingly done, and judgment against defendant for costs, etc., rendered. From this judgment, the defendant, Mrs. Bradley, prayed for and obtained an appeal to the Supreme Court of Illinois, which appeal she subsequently abandoned.

At the September term, 1901, of said circuit court, the defendant, Mrs. Bradley, paid the costs and took a new trial, under the statute of Illinois, which provides that either party in an ejectment suit, against whom judgment is rendered, may have the judgment vacated, and a new trial of the cause at any time within one year after judgment upon payment of all costs therein. (See Chap. 45, Sec. 35, Starr & Curtis' Annotated Statute of Illinois, Vol. 2.)

While the cause was pending for new trial the defendant, Mrs. Bradley, sought to enjoin the further prosecution of the ejectment suit by bill filed by her for that purpose in the United States Circuit Court for the Northern District of Illinois, on November 12, 1901, to which bill a demur was sustained and bill dismissed, and Mrs Bradley appealed the case to this court, where it is now pending as Bradley *v.* Lightcap, No. 343; after failing to obtain an injunction in the United States Circuit Court, she sought to enjoin the ejectment suit by bill filed by her for that purpose in the said Fulton County Circuit Court May 26, 1902, to which also a demurrer was sustained and bill dismissed. She appealed the last

cause to the Supreme Court of Illinois, which sustained the decree of the lower court, (for the opinion of the Supreme Court of Illinois sustaining the lower court in dismissing the bill. See Bradley *v.* Lightcap, 202 Ill., 154).

This last case Mrs. Bradley has brought into this court where the same is now pending as Lydia Bradley *v.* Lightcap No. 306.

After the disposition of the two chancery suits above referred to, the ejectment suit was tried for the third time in the Fulton County Circuit Court at its September term, 1902, which resulted in a finding and judgment for the plaintiff therein from which Mrs. Bradley took an appeal to the Supreme Court of Illinois, where the judgment of the lower court was affirmed. (See Bradley *v.* Lightcap, 201 Ill., 511); and Mrs. Bradley has brought the cause into this court, so that this court now has the entire litigation before it in the shape of three cases, each entitled Lydia Bradley *v.* H. W. Lightcap, and numbered on the docket of this court 243, 306 and 343.

On the trial of this cause (ejectment), defendant in error, Lightcap, proved title in himself by a regular chain of conveyances from the United States, by patents to Abijah Taylor, Jr., thence by mesne conveyances to himself.

The plaintiff in error on the last trial of this cause, produced no paper or record title, but rested her defense on the question of the validity of Sec. 30, of an Act of the General Assembly of the State of Illinois, approved March 22, 1872, in force July 1, 1872, relating to judgments and decrees, which section limits the time within which a deed can be made on a certificate of purchase issued by a sheriff or master in chancery upon a sale in pursuance of a judgment or decree of foreclosure, etc., as the same relates to or bears on the following state of facts, which appear in the case, viz.: On August 13, 1868, one Absalom McCune, then being the owner of the land in controversy, executed to the plaintiff in error, Lydia Bradley, three promissory notes for five thou-

sand dollars each, due in 1, 2, and 3 years from date, drawing ten per cent. interest, and to secure the payment of the same, said McCune, on the same day executed to one E. G. Johnson, as trustee, a trust deed in the nature of a mortgage on the land in controversy. Subsequent to the trust deed, but before the foreclosure suit was commenced, McCune conveyed the land to B. S. Prettyman.

Default was made in the payment of the notes and interest, and Mrs. Bradley and E. G. Johnson, the trustee, he also acting as her solicitor, filed a bill in chancery to the March term, 1872, of the Mason County Circuit Court, to subject the land in controversy, and other lands, to the payment of the said notes. Upon the final hearing of that cause, the circuit court of Mason County, at its August term, 1879, to wit: August 22, 1879, found the amount due Mrs. Bradley on her notes, etc., to be $31,500, and entered a decree and order of foreclosure of the trust deed to Johnson and sale of the land by the Master in Chancery of Mason County as in ordinary foreclosure and sales. In pursuance of the decree and order of the court, the Master proceeded to advertise and make sale, which sale was made by the Master in Chancery on the 27th day of October, 1879, and Mrs. Bradley bid the sum of $10,000 therefor, and she being the highest bidder, the lands were struck off to her, and she received a certificate of purchase from the Master in the usual form, which entitled the holder thereof to the redemption money if redemption was made, or to a deed for the land, if not redeemed within fifteen months from day of sale. The Master reported his acts to the court, which was approved by the court Nov. 29, 1879.

The land was vacant and unoccupied, and in 1872, pending the foreclosure proceeding, Mrs. Bradley took possession of the premises, and by her tenants continued to hold possession up to the time of the commencement of the ejectment suits, and is still in possession. No deed was ever taken out on the certificate of purchase. The defendant in error purchased the land from Pretty-

man and received his deed therefor on September 4, 1893, and on the refusal of plaintiff in error to deliver possession to him, commenced the five ejectment suits which constitute this cause.

In the lower courts, it was insisted on the part of plaintiff in error that inasmuch as the section of the statute (Sec. 30 of Chap. 77) hereinbefore referred to was passed and went into effect subsequent to the date of the McCune trust deed to Johnson, which was foreclosed and land sold by the Master in Chancery under and by virtue of the decree and order of the court, it did not operate on the certificate; that to hold the statute did operate on the certificate of purchase and thereby it became null and void, if the deed was not taken out within five years as the statute provides, impaired the obligation of the contract, and rendered the statute obnoxious to Sec. 10 of Article 1 of the Constitution of the United States, also to Sec. 14 of Article 2 of the Constitution of Illinois, both of which are substantially the same and forbid the passage of any law impairing the obligation of contracts; also that the said statute as construed and as applied by the Supreme Court, contravenes Sec. 1 of the 14th Amendment to the Constitution of the United States and Sec. 1979 of the revised statute thereof, in as much as plaintiff in error claims she is deprived of her property, without due process of law.

While the assignment of errors both in this court, and the court below, are voluminous, we believe the court will find the above is a fair statement of the errors claimed and upon which its jurisdiction, if any, exists.

BRIEF.

I.

Sec. 30 of Chap. 77 of the Illinois Statute complained of, is a statute of limitation, and so held to be by the Supreme Court of Illinois.

Ryhiner *v.* Frank, et al., 105 Ill., 326, 330.

Peterson *v.* Emmerson, 135 Ill., 55, 60.

Seeberger *v.* Weinberg, 151 Ill., 369, 382.
Brown *v.* Ridenhower, 161 Ill., 239.
Lightcap *v.* Bradley, 186 Ill., 510, 515.
Bradley *v.* Lightcap, 201 Ill., 511, 519.
(See Arg. post, pp. 14 to 15.)

II.

The Legislature of a State has the right to enact statutes of limitation, and it is no objection to their validity that they are made to apply to existing rights, provided a reasonable time be given in future for complying with the statutes, and under repeated decisions of this court, the statute complained of is not unconstitutional.

Wheeler *v.* Jackson, 137 U. S., 245, 255.
Terry *v.* Anderson, 95 U. S., 628, 632.
Kashkonong *v.* Benton, 104 U. S., 668, 674.
Jackson *v.* Lamphier, 3 Peters, 280, 290.
Bronson *v.* Kinzie, 1 How, 311, 316.
Ross *v.* Duvall, 13 Peters, 45, 64.
Vance *v.* Vance, 108 U. S., 514.
(See Arg. post, pp. 15 to 20.)

III.

In Illinois, the title to land mortgaged is not out of the mortgagor, except as between him and mortgagee, and then only as an incident of the mortgage debt for the sole purpose of obtaining satisfaction; as to all other persons, and for all other purposes, the mortgagor is the legal owner of the mortgaged premises, and in the case at bar, the Supreme Court of Illinois merely adheres to the law of the State, as it always has existed therein.

Fitch *v.* Pinckard, 4 Scam. 69, 82, 83.
Ryan *v.* Dunlap, 17 Ill., 40.
Sargent *v.* Howe, 21 Ill., 149.
VanSant *v.* Allmon, 23 Ill., 30.
Hall *v.* Lance, 25 Ill., 250.
Harris *v.* Mills, 28 Ill., 44, 46.
Pollock *v.* Maison, 41 Ill., 516.

Emory *v.* Keigan, 88 Ill., 482.
Delano *v.* Bennett, 90 Ill., 533.
Barrett *v.* Hinckley, 124 Ill., 32.
Lightcap *v.* Bradley, 186 Ill., 518, 524.
Ware *v.* Schints, 190 Ill., 189.
Hughes *v.* Edwards, 9 Wheat, 497, 500.
Hutchinson *v.* King, 1 Wall, 53.

While the mortgage conveys to the mortgagee a legal title it is only a limited or qualified legal title, and neither before nor after condition broken does the mortgagee have the "absolute legal title" under the law of Illinois. On the contrary it is only a base or determinable fee. Independent of the debt, which the mortgage is given to secure, he has no title whatever. When the debt is paid, released, discharged or barred by the statute of limitations or in any way satisfied, the mortgagee's title is extinguished by operation of law.

Barrett *v.* Hinckley, 124 Ill., 32, 46, and cases cited therein.

Delano *v.* Bennett, 90 Ill., 533, 536.
Waughop *v.* Bartlett, 165 Ill., 124, 132.
Speer *v.* Hadduck, 31, Ill., 439, 443.
Bogardus *v.* Moses, 181 Ill., 554.
Lightcap *v.* Bradley, 186 Ill. 510, 518, 524.
Ware *v.* Schintz, 190 Ill., 189.

The title which the mortgagee gets by the mortgage can be used by him for one and only one purpose, viz.: as a means for the collection of the debt secured, or so much thereof as the mortgaged premises, when resorted to for that purpose, will satisfy. A valid foreclosure of the mortgage by a decree of a court of equity in a foreclosure suit, followed by a valid sale in pursuance of the decree, extinguishes the mortgage lien and satisfies the debt so far as the mortgage and land is concerned.

Smith *v.* Smith, 32 Ill., 198.
Siligman *v.* Laubheimer, 58 Ill., 124, 126.
Ogle *v.* Koerner, 140 Ill., 170, 179, 180.
Rains *v.* Mann, 68 Ill., 264.

Robins *v.* Swain, 68 Ill., 197.
Finley *v.* Thayer, 42, Ill., 350, 353.
Trustees of School *v.* Love, 34 Ill. App., 418, 419, 420.
People *v.* Beebe, 1 Barb. (N. Y.), 379, 388.

The land having been once applied by sale under a valid foreclosure toward satisfying the debt which was a charge upon it, could not again be sold or applied to the payment of the same charge.

State Bank *v.* Wilson, 4 Gilman, 57, 67.
Whiteneck *v.* Agritt, 56 Ill. App., 72.
Smith *v.* Smith, 32 Ill., 198.
Hughes *v.* Frisby, 81 Ill., 188.
Ogle *v.* Koerner, 140 Ill., 170, 180.
Smith *v.* Vandyke, 17 Wis., 214, 216.
Smith *v.* Luddington, 17 Wis., 344, 349.
Warrick *v.* Hull, 102 Ill., 280.

The authorities already cited shows that a mortgagee or *cestui que trust*, who becomes the purchaser at the foreclosure sale, thereafter sustains the same relation to the property that any stranger would sustain if such stranger had been purchaser. (See further on this):

Davis *v.* Dale, 150 Ill., 239, 243, 244.

After the sale the only parties who had any interest or right in or to the land sold were Prettyman as the grantee of the mortgagor, and Mrs. Bradley as the holder of the certificate of purchase. Prettyman could free his land from the lien of the certificate by redeeming as provided by the statute and the certificate gave Mrs. Bradley the right to receive the redemption money, if redemption was made, or, if redemption was not made, then a deed for the land by complying with the statute. And this leads us to the inquiry as to what a certificate of purchase is under the laws of Illinois.

(See Arg. post, pp. 20 to 27)

IV.

In Illinois, a certificate of purchase, is only a lien. No title passes to the holder of it, and there is none vested

in him until the deed is made. Until the deed is made, he is not even entitled to the possession of the premises.

Bennett *v.* Matson, 41 Ill., 332, 344.
O'Brien *v.* Fry, 82 Ill., 274, 277.
Rockwell *v.* Servant, 63 Ill., 425.
Vaughn *v.* Ely, 4 Barb., 159.
Evertson *v.* Sawyer, 2 Wend., 507.
Aldrich *v.* Sharp, 3 Scam, 261, 263.
Kelhotts *v.* Wolf, 8 Brad. (Ill. App.), 371.
Johnson et al. *v.* Baker, 38 Ill., 98, 102.
Hays *v.* Cassell, 70 Ill., 669, 672.
Stephens *v.* Ill. M. F. Ins. Co., 43 Ill., 327.
Lightcap *v.* Bradley, 186 Ill., 510.
Bowman *v.* The People, 82 Ill., 246.
Roberts *v.* Clelland, 82 Ill., 538, 542.
Smith *v.* Calvin, 17 Barb. (N. Y.), 161.
(See Arg. post, pp. 27 to 29.)

V.

The statute complained of, at most, only operated upon the remedy, and not even upon that until after all contract rights, obligations and duties given by, or growing out of the McCune trust deed had been enforced, and the trust deed itself extinguished by the foreclosure and sale. From and after the sale, all rights and interest of plaintiff in error in or to the land were measured by the certificate of purchase.

Davis *v.* Dale, 150 Ill., 239, 248, 244.
Ogle *v.* Koerner, 140 Ill., 170, 179, 180.
Seligman *v.* Lanbheimer, 58 Ill., 124.
Seeberger *v.* Weinberg, 151 Ill., 369, 380, 381.
Lightcap *v.* Bradley, 186 Ill., 510, 526.
Peterson *v.* Emmerson, 135 Ill., 55.
Ryhiner *v.* Frank, 105 Ill., 326.
Smith *v.* Smith, 32 Ill., 198.
Rains *v.* Mann, 68 Ill., 264.
Wyman *v.* Cochran, 35 Ill., 152.
Leslie *v.* Bontil, 130 Ill., 501.

A legislative act is not in conflict with the federal constitution, prohibiting the impairment of the obligation of a contract, unless it operates directly on the contract and impairs it.

Hanford *v.* Davies, 163 U. S., 273.
Turner *v.* Wilkes, 173 U. S., 461.
Central Land Co. *v.* Laidley, 159 U. S., 109.
VanHoffman *v.* City of Quincy, 4 Wall, 535.
(See Arg. post, pp. 24 to 35.)

VI.

The conclusions of the Supreme Court of Illinois as to the respective rights, title and interest of the mortgagor and mortgagee, the effect of the foreclosure proceedings, and the sale of the mortgaged premises by the master in chancery, the relation which the plaintiff in error sustained to the property, by bidding the same off at the sale, the rights or interest acquired by the certificate of purchase, the rights, title and estate still remaining in the mortgagor or his grantee, Prettyman, after the sale, the necessity of a deed, after redemption expired, in order to divest the title and estate of the mortgagor, or his grantee and vest the same in the holder of, the certificate, being predicated on the general local law of the State governing the same, are not reviewable by this court on a writ of error to the Supreme Court of the State.

New Orleans Water Co. *v.* Louisiana S. R. Co., 125 U. S., 18.
Central Land Co. *v.* Laidley, 159 U. S., 109.
Turner *v.* Wilkes County, 173 U. S., 461.
Abraham *v.* Casey, 179 U. S., 210.
Arndt *v.* Griggs, 134 U. S., 316.
See Arg. post pp. 35 to 39

VII.

A certificate of purchase is not even color of title, much less does it confer title.

Bride *v.* Watt, 23 Ill., 507, 511.
Rigor *v.* Frye, 62 Ill., 507.

Shackleford *v.* Bailey, 35 Ill., 387.
Perry *v.* Burton, 111 Ill., 138, 141.

The title which is required by Section 4 of Chap. 83 must be at least a *prima facie* good title either in law or equity, and must continue in the party setting up the bar, for seven years, as well as the possession for seven years.

Elston *v.* Kennicott, 46 Ill., 207, Opinion on rehearing.
Moore *v.* Brown, 52 U. S., (11 How), 414.
Skyle's Heirs *v.* King's Heirs 2, A. K. Marshall, 385.

The Supreme Court of Illinois has expressly decided that there is no title in the holder of the certificate of purchase either legal or equitable, and especially after the certificate is barred by the statute.

Ryhiner *v.* Frank, 105 Ill., 326, 330.
Peterson *v.* Emmerson, 135 Ill., 55, 60.
Seeberger *v.* Weinberg, 151 Ill., 368, 382.
Brown *v.* Ridenhower, 161 Ill., 239.
Lightcap *v.* Bradley, 186 Ill., 150, 515.
Bradley *v.* Lightcap, 201 Ill., 511, 519.
Bradley *v.* Lightcap, 202 Ill., 154.
Heacock *v.* Lubuke, 107 Ill., 396.
(See Arg. post, pp. 39 to 47)

VIII.

It is not only a statutory provision, but an elementary rule, strictly adhered to by this court, that the construction of State law upon questions affecting the title to real property by the highest court of the State where the land is located, is binding upon this court, and so also as to statutes of limitation.

Revised Statutes of U. S. Chap. 12, title 13, Sec. 721.
DeVaughn *v.* Hutchinson, 165 U. S., 566.
Clark *v.* Clark, 178 U. S., 186.
Brine *v.* Ins. Co., 96 U. S., 627.
Clark *v.* Graham, 6 Wheat, 577.

Abraham *v.* Casey, 179 U. S. 210.
Williams *v.* Kirtland, 13 Wall, 306.
Turner *v.* Wilkes, 173 U. S., 461, 464.
Arndt *v.* Griggs, 134 U. S., 316.
Forsyth *v.* Hammond, 166 U. S., 518.
Percy *v.* Cockrill (C. C. A.), 53 Fed., 872.
Brunswick *v.* Bank, 99 Fed., 635.
Morley *v.* Lake Shore Co., 146 U. S., 162.
Board *v.* Louisiana, 179 U. S., 622.
(See Arg. post., pp. 47 to 48.)

IX.

The decision of the Supreme Court of Illinois complained of, rests on independent grounds, not involving a federal question and broad enough to maintain its judgment, viz., the application of the doctrine of *res adjudicata*, and under repeated decisions of this court the writ of error should be dismissed, or the judgment affirmed without considering any other question.

California Powder Works *v.* Davis, 151 U. S., 389.
Hale *v.* Akers, 132 U. S. 554 and cases cited.
Murdock *v.* Memphis, 20 Wall, 590.
Jenkins *v.* Loewenthal, 110 U. S., 222.
Castillo *v.* McConnico, 168 U. S., 674.
Eustis *v.* Bolles, 150 U. S., 361.
(See Arg. post., pp. 48 to 52.)

X.

The statute complained of is not inconsistent with the Fourteenth Amendment of the United States Constitution, or Section 1979 of the Revised Statute.

Wheeler *v.* Jackson, 137 U. S., 245.
Terry *v.* Anderson, 95 U. S., 628.
Saranac L. Co. *v.* Roberts, 177 U. S., 318.
Hurtado *v.* California, 110 U. S., 516.
In re Brown, 135 U. S., 705, 707.

It is well settled by the decisions of this court that the Fourteenth Amendment was not designed to limit, and does not limit what is known as the police power of the States, a familiar instance of the exercise of which is the enactment of statutes of limitation, and there is no constitutional objection to their validity provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action or performing an act after its passage and before the bar takes effect.

Cooley's Constitutional Limitation, p. 434 (6th ed.).
Wheeler *v.* Jackson, 137 U. S., 255.
Turner *v.* New York, 168, U. S., 90, 94.
Davidson *v.* New Orleans, 96 U. S., 97, 102.
L. & N. R. Co. *v.* Schmidt, 177 U. S., 230, 236.
Iowa Central R. Co. *v.* Iowa, 160 U. S., 389, 393.
Leeper *v.* Texas, 139 U. S., 462.
Missouri P. R. Co. *v.* Humes, 115 U. S., 512, 518.
Minneapolis R. Co. *v.* Beckwith, 129 U. S., 26, 29.
Caldwell *v.* Texas, 137 U. S., 692, 697.
Munn v. Illinois, 94 U. S., 113, 134.
Grozza *v.* Tiernan, 148 U. S., 657, 661.
Stearns *v.* Gettings, 23 Ills., 387.
Hurtado *v.* People, 110, U. S., 516.
(See Arg. post., pp. 52 to 59.)

XI.

The decision of the Supreme Court of Illinois, which this court is asked to review, proceeds not only upon the general jurisprudence of the State, but is also based upon rules of property, fully established in a series of adjudications by the highest court of the State, long acquiesced in by its citizens, and firmly implanted in its jurisprudence, as is well shown by the decisions of the State Supreme Court hereinbefore cited. And under repeated decisions, this court will apply the rules adopted in the State to the determination of the controversy.

Suydam *v.* Williams, 24 How., 427.
Chicago vs. Robbins, 2 Black, 418.
Gage *v.* Company, 115 U. S., 454.
Burgess *v.* Seligman, 107 U. S. 20.
Lane *v.* Vick, 3 How., 464.
Greene *v.* Lessee of Neal, 6., 291.
(See Arg. post., pp. 59 to 62.)

ARGUMENT.

I.

Following the order of our brief, we respectfully ask the attention of the court to a few suggestions on the law and its application.

Under the laws of Illinois (Starr and Curtis Annotated Statutes of Illinois, Chap. 77, Sec. 16), when real estate is sold by virtue of an execution, judgment or decree of foreclosure of mortgage, etc., it is the duty of the sheriff, master in chancery or other officer making the sale, to issue to the purchaser, a certificate commonly spoken of as a certificate of purchase, describing the premises purchased, the amount paid or bid for the same, and the time when the purchaser will be entitled to a deed, unless the premises shall be redeemed. The judgment debtor or mortgagor has 12 months in which to redeem (same statutes, Sec. 18) and any decree or judgment creditors of the debtor or mortgagor may redeem after the expiration of 12 months and before the expiration of 15 months from the day of sale (same statutes, Sec. 20). If there be no redemption within 15 months, the holder of the certificate of purchase is entitled to a deed, conveying to him the premises sold, upon complying with Sec. 30 of Chap. 77 of the Statute of Illinois, and it is this section of the statute which plaintiff in error complains of. It reads as follows:

"When the premises mentioned in any such certificate "shall not be redeemed in pursuance of law, the legal "holder of such certificate shall be entitled to a deed "therefor at any time within five years from the expi-

"ration of the time of redemption. The deed shall be "executed by the sheriff, master in chancery or other "officer who made such sale, or by his successor in office, "or by some person specially appointed by the court "for the purpose. If the time of redemption shall have "elapsed before the taking effect of this Act, a deed "may be given within five years from the time this Act "shall take effect. When such deed is not taken within "the time limited by this Act, the certificate of pur"chase shall be null and void; but if such deed is wrong"fully withheld by the officer whose duty it is to exe"cute the same, or if the execution of such deed is re"strained by injunction or order of a Court or judge, the "time during which the deed is so withheld or the exe"cution thereof restrained, shall not be taken as any "part of the five years within which said holder shall "take a deed." Starr & Curtis' Illinois Statute, Vol. 2, Chap. 77, Sec. 30.

This act complained of was passed March 22, 1872, and went into effect July 1, 1872. That this is a limitation statute is apparant upon its face, and no judicial determination was necessary to make it such. The language used by the General Assembly is clear, ample and sufficient for that purpose. However, to forever settle any question about it, we have the decisions of the Supreme Court of Illinois in a number of cases in which the court holds that the statute is one of limitation and affects only the remedy. Ryhiner *v.* Frank, 105, 111, 350. (See also case cited in brief under point I.) Leaving for the present the question as to how far this court is bound by the decisions of the Supreme Court of Illinois, in the construction of this statute, let us in the next place see what extent the legislature has the right to pass limitation statutes.

II.

If we are able to understand adjudicated cases, it is a settled principle of law that statutes of limitations fixing the time within which an action may be brought

or a particular thing done, as the taking out of a deed on a certificate of purchase, are regulations affecting the remedy that are clearly within the sphere of State legislation. That the parties to a contract have no more vested right or interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. On the contrary, the legislature may provide a limitation where none existed before, as well as shorten the time within which suit to enforce existing action may be commenced, or act performed, provided a reasonable time, taking all the circumstances into consideration, be given by the legislative act prescribing the limitation for the commencement of the action, or the performance of the act, before the bar takes effect.

Let us briefly examine some of the cases cited.

Terry *v.* Anderson, 95 U. S., 628, was a case where the cause of action on the obligations had been running nearly four years, and under the law as it then existed, the creditor had 20 years in which to bring suit. Subsequently, the legislature of Georgia passed an act limiting the period in which suit on such past due obligation should be brought by January 1, 1870, which gave the creditor only 9 months and 17 days in which to bring his action. It was insisted that the act was unconstitutional, because it impaired the obligation, and the agreement was made in that case along the same line as the case at bar, that as the statute of limitation in force when the liability of the defendant was incurred did not bar the action until the expiration of 20 years from the time the action accrued, a statute passed subsequently reducing the limitation was such an impairment of the contract as to render the statute void. This court however held the act valid. Chief Justice Waite in delivering the opinion of this court said (p. 633-4): "This court has often "decided that statutes of limitation affecting existing "rights are not unconstitutional if a reasonable time "is given for the commencement of an action before "the bar takes effect." (Citing Hawkins *v.* Barney, 5

Peters, 451. Jackson *v.* Lamphier, 3 Peters, 280. Sohn *v.* Waterson, 17 Wall, 596. Christian *v.* Russell, 5 Wall, 290. Sturges *v.* Crowninshield, 4 Wheat, 122.) "It is "difficult to see why if the legislature may prescribe a "limitation where *none* existed before, it may not "change one which has already been established. The "parties to a contract have no more *vested* interest in "a particular limitation which has been fixed than "they have in an unrestricted right to sue. They have "no more a vested interest in the time for the com- "mencement of an action than they have in the form "of the action to be commenced, and as to the form "of action, or mode of remedy it is well settled that "the legislature may change them at discretion, provid-ed "~~ing~~ adequate means of enforcing the right remains. "In all cases, the question is one of reasonableness, "of that the legislature is primarily the judge, and we "can not overrule the decision of that department of "the government unless a *palpable* error has been com- "mitted."

The case of Koskhonong *v.* Burton, 104 U. S., 668-674, is if anything, a still stronger case in support of our position.

In Jackson *v.* Lamphier, 3 Peters, 281, 289-290, this court said: "It is within the undoubted power of the "State legislature to pass recording acts, by which the "elder grantee shall be postponed to a younger if the "prior deed is not recorded within the limited time, "and the power is the same whether the deed is dated "*before* or after the passage of the recording act. "Though the effect of such law is to render the prior "deed *fraudulent* and *void* as to subsequent purchasers, "it is not a law impairing the obligation of contract, "such too, is the power to pass acts of limitation and "*their effect.*"

Vance *v.* Vance 108 U. S., 514, was a case where the Civil Code of Louisiana, provided in respect to tutors of minors, as follows: "The property of the tutor is "tacitly mortgaged in favor of the minor from the day "of his appointment as tutor, as security for his admin-

"istration and for the responsibility which results from "it." There was a tacit mortgage under this law which had been in full force and virtue from October 15, 1859. In 1868, the State adopted a new constitution in which it provided "that no mortgage or privilege shall here- "after affect third parties unless recorded in the parish "where the property to be affected is situated. The "tacit mortgages and privileges now existing in the "State shall cease to have effect against third persons "after 1st of January, 1870, unless duly recorded. The "General Assembly shall provide by law for the regis- "tration of all mortgages and privileges."

This, the legislature proceeded to do on the 8th day of March, 1869. This court in the foregoing case, upheld the validity of that clause of the State Constitution, and in doing so said (p. 517): "It is in the nature "of a statute of limitation, the right to prescribe the "time within which existing rights shall be prosecuted, "and means by and conditions on which they may be "*continued in force* is, we think, undoubted. Otherwise, "when no term of prescription exists at the inception "of a contract, it would continue in perpetuity, and all "laws fixing a limitation would be abortive. Now, "it is elementary, that a State may establish, alter, "lengthen or shorten the period of prescription of exist- "ing rights; provided that a reasonable time be given "in future for complying with the statute."

While upon this branch of the case, we desire to call the court's attention to one other case cited in our brief. It is the case of Wheeler *v.* Jackson, 137 U. S., 245.

In the charter of the city of Brooklyn, passed in 1854, there was a provision for the collection of taxes and assessments which in substance, provided that the collector should sell property against which taxes and assessments remained unpaid, for the lowest term of years for which any person would purchase it, and that the purchaser should receive a certificate of sale, which, when recorded in the Recorder's office should constitute a lien on the premises sold, that the owner

of the premises might redeem within two years by paying the purchase money and any other taxes paid by the purchaser and 15 per cent. in addition. In case the land was not redeemed within the specified time, the collector should execute to the purchaser a proper conveyance of the land sold, and thereupon the purchaser might obtain possession by summary procedings. In 1885 an act was passed by the legislature providing that no special proceedings should be maintained to compel the execution of the conveyance by the collector upon any sale for taxes made more than eight years prior to its passage unless brought within six months thereafter, and that after the lapse of six months, all sales made more than eight years prior to the passage of the act *should be cancelled and the lien of the certificate of sale should cease.* Wheeler held a number of certificates which were obtained on sales made more than eight years prior to the Act of 1885. He did not apply for any conveyance until after the six months provided in the act had elapsed. Subsequent to the expiration of the six months, he applied for his lease or deed which was refused, on the ground that he had lost his rights which his certificates gave at the expiration of six months from the time the Act of 1885 went into effect, although but for that act his lien would have been perfectly good and he would be entitled to his lease or conveyance, he brought suit in the State court to compel the execution of leases on his certificates, was defeated, and the case was finally brought before this court, and the court held the Act of 1885 was not unconstitutional, as impairing the obligation of contracts, because it prescribed a shorter period within which actions might be brought, also that it was not unconstitutional under the Fourteenth Amendment because it provided for the cancellation of the lien of the certificate of sale, in case proceedings to compel the execution of leases were not commenced within six months after its passage, since the substantial acquisition of the purchase was a right to a

conveyance or lease after the period of redemption, and not a right to a permanent lien, irrespective of reasonable limitations prescribed by the legislature.

It appears to us that the holder of the certificate of sale, in the foregoing case of Wheeler *v.* Jackson presented to this court a much stronger case for the interposition of this court on the ground that the act was unconstitutional, than is presented by the plaintiff in error in the case at bar.

In Wheeler *v.* Jackson, the certificates were in the hands of the purchaser in full force and effect with the right to delay taking out the conveyance unaffected by any statute when the legislature passed the Limitation Act of 1885. In the case at bar, the statute complained of had been in full force and effect for more than seven years before the certificate of purchase came into existence. But in either case, the doctrine is sound, so long as a reasonable time is given to comply with the statute.

III.

The plaintiff in error attacks the validity of the statute referred to, not alone on the ground that it is in and of itself unconstitutional, but that it is rendered unconstitutional by the construction which the court gave it, and that the court itself has changed its holdings and the law relating to mortgages and their argument was, and still is, based on the assumption that there was an estate and title in the mortgagee which existed, independent of the mortgage debt; that after condition broken (to use their own language taken from their brief in the State Supreme Court), "the "mortgagee was the real owner as against all the "world;" that he could do what he saw fit with the mortgaged property, subject only to an equity of redemption in the mortgagor which was only an equitable right, recognized only by courts of equity," and "that after a foreclosure, or an effort to foreclose the "mortgage, followed by possession, the mortgagee held

"under claim and color of title, and unless redemption "was made in pursuance of the decree or the statute, "he, the mortgagee, thereafter was the sole owner of "both the legal title and the equity of redmption." And that the Supreme Court in Lightcap *v.* Bradley, 186 Ill., 510, which was the first time the case at bar was before the Supreme Court changed the law in this regard. In this court they modified it somewhat, they now say "after condition broken the title becomes absolute in the mortagee."

By a careful study of the opinion referred to in Lightcap *v.* Bradley, 186 Ill., 510, as well as in the opinion now before this court, we fail to find, and we believe this court will fail to find, any new principles of law or any departure from old well-settled principles as to the title, rights and interests which the mortgagor and mortgagee respectively hold and ever have held in the mortgaged property in the State of Illinois. Instead of the mortgagee, either before or after condition broken "being the real owner of the "land as against all the world," or the title becoming "absolute in the mortgagee" the law is and ever has been just the contrary. "The title is never out of the "mortgagor, except as between him and the mortgagee "and as an incident of the mortgage debt, for the pur-"pose of obtaining satisfaction." As to all other persons and for all other purposes, the mortgagor is the legal owner and holder of the mortgaged estate.

That the Supreme Court of Illinois, both times that this case was before it (the first time as Lightcap *v.* Bradley, 186 Ill., 510, and the last time as Bradley *v.* Lightcap, 201, Ill., 511) made no departure from the law of Illinois as it existed before, at the time, and ever since the McCune trust deed came into existence, but on the contrary adhered strictly to the principles laid down in a long line of decisions of that court, we invite this court's attention to the authorities cited under division III. of our brief. We will briefly review some of them.

The case of Fitch *v.* Pinckard, 4 Scam, 69, decided at

the December term, 1842, was an ejectment suit in which the question as to whether the mortgagee or mortgagor was to be regarded as the real owner of the land was before the Supreme Court and the Supreme Court held that although the earliest doctrine in England was that the whole legal estate was in the mortgagee, and that courts of law were not inclined to notice the interest of the mortgagor, still that was not the law of Illinois, that the strictness of the English law had yielded to the principles of justice so as to carry into effect the true intent of the parties, and that as the law of Illinois then stood (1842) to use the language of the court: "The mortgagor is now regarded "as the real owner of the land for all beneficial pur- "poses subject to the charge of the repayment of the "money."

The case of Sargent *v.* Howe, 21 Ill., 148, decided January term, 1859, was a chancery proceeding growing out of the transfer of notes secured by a mortgage, and one of the questions before the court was whether the debt or the mortgage was the principal thing, and the court held that it was a well established doctrine that the debt was the principal thing and the mortgage a mere incident, and that a satisfaction of the debt released the mortgage.

Vansant *v.* Allmon, 23 Ill. 30, decided at the November term, 1859, was a chancery proceeding in which Justice Breese in delivering the opinions, said: "It is "a well settled and familiar principle that the debt "is the principal thing and the mortgage only an inci- "dent—mere security for the payment of the debt."

Hall *v.* Lance, 25 Ill., 277, decided at the January term, 1861, was an ejectment suit and under the law of Illinois the defendant in an ejectment suit could then, and still can, defeat a recovery by showing, an outstanding title, but the court decided that a mortgage, even after condition broken, was not an absolute outstanding title of which a stranger can take advantage to defeat recovery in ejectment.

Harris *v.* Mills, 28 Ill., 44, decided at the April term,

1862, arose on a bill to foreclose a mortgage, the statute of limitation having barred a recovery by suit on the note, but there being no express statute barring a foreclosure proceeding, the question was presented as to whether or not an action on the note being barred by the statute, it formed a bar to the foreclosure of the mortgage by bill, and the court held that it did; that the debt was the principal thing, and the mortgage a mere incident, and that the bar which the statute interposed against the principal thing, the debt, was a bar to the incident, the mortgage.

Pollock *v.* Maison, 41 Ill., 516, decided at the April term, 1866, was an ejectment suit in which the mortgagee sought to recover possession of the premises against the widow and heirs of the mortgagor who defended on the ground that the notes, to secure which the mortgage was given, were barred by the statute of limitation, claiming that as the notes were barred, a recovery under the mortgage was also barred. The defense was sustained by the Supreme Court, the court holding that although the mortgagee may make entry after condition broken, and may maintain ejectment, as one of the modes of foreclosing or obtaining satisfaction, yet the debt was the principal thing, and when that was gone, the incident, the mortgage, was gone also, and that a foreclosure in any mode can not then be had either by ejectment, *saire facias*, bill in equity, or otherwise.

Emory *v.* Keighan, 88 Ill., 482, was also an ejectment suit, held the same doctrine, and further said the "existence of the debt to secure which a mortgage is given, is essential to the life of a mortgage, and when the debt is paid, discharged, released or barred by the statute of limitation, or by a judgment of a court, the mortgage is gone and has effect no longer."

Cottingham *v.* Springer, 88 Ill., 90, decided January term, 1878, was an ejectment suit in which the Supreme Court reviews some of the innovations and modifications which many of the States, and especially Illinois, had made to the strictness of the common law,

and holds the law of Illinois to be that the mortgagor, for all beneficial purposes, is the real owner of the land mortgaged, subject only, to the payment of the money.

Delano *v.* Bennett, 90 Ill., 533, was an ejectment suit decided September term, 1878. The court held that a mortgage is a mere incident to the mortgage debt, and that a conveyance of the interest of the mortgagee in the land without an assignment of the debt, is considered in law a nullity.

Barrett *v.* Hinckley, 124 Ill., 32, was an ejectment suit, decided at the January term, 1888. The Supreme Court, in a very able and extended opinion by Justice Mulkey, reviewed the law concerning mortgages, and the rights, title and estate of the mortgagee and mortgagor in the mortgaged premises, and after reviewing the early English law and the dual system which had grown up between equity and law respecting mortgages, proceeds to state the law of Illionis in these words, 124 Ill., 46: "It must not be concluded from "what we have said that the dual system respecting "mortgages as above explained, exists in this State, "precisely as it did in England prior to its adoption in "this country, for such is not the case. It is a conceded "fact that the equitable theory of a mortgage has, in "process of time, made in this State, as in others, mate-"rial encroachments upon the legal theory which is "now fully recognized in courts of law. That it is now "the settled law that the mortgagor or his assignee is "the legal owner of the mortgaged estate as against "all persons except the mortgagee or his assignee, "(citing Hall *v.* Lance, 25 Ill., 277; Emory *v.* Keighan, "88 Ill., 482). As a result of this doctrine, it follows "that in ejectment by the mortgagor against a third "party, the defendant can not defeat the action by "showing an outstanding title in the mortgagee. (Hall "*v.* Lance), so, too, courts of law now regard the title "of a mortgagee in the nature of a base or determinable "fee. The term of its existence is measured by that of "the mortgage debt. When the latter is paid off, or "becomes barred by the statute of limitations, the

"mortgagee's title is extinguished by operation of law "(citing Pallock *v.* Maison, 41 Ill., 516; Harris *v.* Mills, "28 id. 44; Gibson *v.* Rees, 50 id. 383). Hence the rule "is as well established at law as it is in equity, that the "debt is the principal thing, and the mortgage an inci- "dent."

We will not take up the time of the court by going through with all the cases cited in our brief, but will ask the court, if more be desired to examine Lightcap *v.* Bradley, 186 Ill., 510 and Ware *v.* Schints, 190 Ill., 189. Even this honorable court, as far back as 1824 in Hughes *v.* Edwards, 9 Wheat, 497-500, in determining whether the mortgagee or mortgagor was the real owner of the premises mortgaged, held that the mortgagor was in reality the owner of the land, subject only to the lien. "So much the owner," says the court, "that he is not accountable for the rents and profits "received by him during the continuance of his pos- "session even although the land, when sold, should be "insufficient to pay the debt."

And in Hutchison *v.* King, 1 Wall, 53, in determining the rights, title, interest and estate which the mortgagor and mortgagee respectively held in and to the mortgaged premises, this honorable court speaking through Mr. Justice Field said: "A mortgage is in *form* a conveyance vesting in the mortgagee upon its execution a conditional estate which becomes absolute upon breach of condition. At law it was *originally* held to carry with it all the rights and incidents of ownership, the right of the mortgagee to be treated as owner of the mortgaged premises could only be defeated upon the performance of the condition annexed by the day designated. Subsequent performance only gave a right to the mortgagor to resort to a court of equity for relief from forfeiture arising upon breach of condition. Such is the law at this day in some of the States of the Union. But in a majority of the States the law in this respect has been greatly modified by consideration drawn from the object and intention of the parties in executing and receiving instruments of this character. The doctrine established

by courts of equity, looking through the form, to the real character of the transaction, that a mortgage is a mere security for a debt and creates only a lien or incumbrance, and that the equity of redemption is the real and beneficial estate in the land, and may be sold and conveyed in any of the ordinary modes of transfer subject only to the lien of the mortgage has to a great extent by 'a judicial and almost insensible progress,' as Kent observes, been adopted by courts of law. To such a degree has this equitable view prevailed that the interest of the mortgagee is now generally treated by courts of law as real estate only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security. Although in the absence of stipulation as to the possession, he may enter upon the premises, his interest is widely different from that of owner. He can not, by conveyance, transfer any interest in the premises without a transfer of the debt secured. His interest is not subject to attachment or seizure on execution, he can not remove the buildings on the premises, nor the fixtures attached, nor can he subject the premises to any use but such as may furnish the means for the payment of the debt secured without impairing the value of the estate."

The title, interest or estate which the mortgagee holds under the mortgage, lacks every element incident to the title, interest and estate of the "real" or "absolute" owner; while that of the mortgagor both before and after condition broken has atttached to it every incident of absolute ownership.

Let us see. In Illinois the wife of the mortgagee neither has dower nor an incohate right of dower in the mortgaged premises. The land can not be sold on execution for his debt. He is not a freeholder by virtue of the mortgage. On his death, the land does not descend to his heirs. On his death, the mortgage passes to his personal representatives. He can not pass the land by devise. It passes to his personal representatives as personal estate. On his death, a suit to foreclose the mortgage must be brought by his personal representa-

tives, and his heirs are not necessary or proper parties thereto. On the other hand, the wife of the mortgagor is entitled to dower. It may be sold on execution to satisfy a judgment against him. He is a freeholder. He may convey it by deed to a third person. It passes as real estate by his devise. It descends to his heirs. In short, the mortgagor can do anything and everything with his estate in the mortgaged premises, subject only to the lien of the mortgage, which he might or could do if there was no mortgage, and his estate is also, with that exception, subject to the same incidents, while the mortgagee can do nothing with his interest in the mortgaged premises, except in furtherance of the payment of the mortgage indebtedness. Independent of the debt, he has no estate, claim, title or interest in the premises whatever.

IV.

It is a well settled principal of the law of Illinois that a certificate of purchase is only a lien, that no title vests in the holder thereof, until he acquires the sheriff's or master's deed, and that the title of a judgment debtor or of a mortgagor is not divested until the deed is executed. This question has been passed upon by the Supreme Court of Illinois in a number of cases, many of them long before the McCune trust deed was even thought of, among which is Johnson *v.* Baker, 38 Ill., 98, decided at the April term, 1865, in which the court held that until the holder of the certificate of purchase acquires the Sheriff's deed after redemption expires, he is only regarded as a bidder. So in Stephens *v.* Illinois M. F. Ins. Co., 43 Ill., 327, decided January term, 1867.

The Supreme Court states the law to be that the purchaser under a Master's sale on foreclosure of a mortgage acquires no title until the deed is made. That while the deed will relate back to the beginning of the lien in order to cut off intervening incumbrances, yet it will not carry back the absolute divestiture of title, and that until the deed is made the mortgagor still has

the estate of a mortgagor with the qualification that the amount and time of redemption has been absolutely fixed by the decree and sale.

In the case of Bennett *v.* Matson, 41 Ill., ~~328~~ 332, April term, 1866, the court holds that a purchaser at a judicial sale is not entitled to possession before the deed is executed, that until he obtains his deed he is for most purposes a stranger to the possession.

These cases are followed by Rockwell *v.* Servant, 63 Ill., 424, decided at the January term, 1872, declaring the same principal, and at the September term, 1873, in Hays *v.* Cassell, 70 Ill., 669, 672, the court recites the law in these words: "The certificate of purchase con-"veyed no title to the purchaser, nor did it disturb the "possession of the defendant. That title continued in "him, and would remain until fifteen months had elapsed "*and his title transferred by the sheriff's deed.*" So in O'Brien *v.* Fay, 82 Ill., 277, the court says: "By our law the defendant is entitled to the possession between the day of sale and the making of the master's deed." In the case of Lightcap *v.* Bradley, 186 Ill., 510, the cases are carefully reviewed by the court, and the court there finds the law of Illinois to be as we have stated. How could it be otherwise, there is no provision in the statute or law of Illinois that a certificate of purchase shall transfer title, nor does the certificate itself purport to pass any title either in fee, remainder, reversion, a term of years, or any other estate. On the contrary, it negatives the very idea of a transfer of title by telling the holder of it when he will be entitled to a deed if the property be not redeemed. The certificate only purports to give the legal holder of it a right to have the title transferred to him by deed at the expiration of the period of redemption if the property be not redeemed. At the expiration of fifteen months, when redemption expires, the holder of a certificate has the right to demand a deed at any time within the statutory limitation of five years, which deed, when executed will transfer the title which the mortgagor had at the time the mortgage was executed, to the recipient of the deed, but the

holder of the certificate is never vested with title, and the title of the mortgagor is never actually divested until the master's deed is executed, and the holder of the certificate can not be compelled to take the deed if he does not want it.

V.

It can not be reasonably contended that the statute complained of directly affected the contract evidenced by the notes to Mrs. Bradley and the trust deed to Johnson securing the same. Yet that is what it must do to be obnoxious to section 10 of act 1 of the constitution. In Van Hoffman *v.* City of Quincy, 4 Wall, 535, this court in deciding the character of legislation which would be in violation of section 10, laid down this rule: "That the legislation complained of must "affect the contract directly and not incidentally or by "consequence; that it is competent for the statute to "change the remedy or to modify it otherwise as the "legislature see fit, provided no substantial right "secured by the contract be thereby impaired."

The obligation of a contract is one thing, and the remedy to enforce it, another and distinct thing. The one arises when the contract is made, the other on a failure to perform. The one is that which obliges the parties to do or not to do, the other is the legal means to carry it into effect.

Now the statute complained of in no way affected or impaired the contract between Mrs. Bradley and McCune or Johnson as trustee.

At the time the statute was passed and went into effect, the notes and trust deed were in full force and effect. The statute had been in force for over seven years before she obtained her decree of foreclosure. The statute went into effect July 1, 1872, and the decree was rendered August 22, 1879, during all of which time the rights and obligations of the parties under the contract remained the same, even to the extent of the different remedies which she might pur-

sue, to enforce the obligation and obtain satisfaction of the debt. She had several remedies which she might have pursued all this time, for instance, sale of the land under the power given in the trust deed; personal judgment against McCune; ejectment and possession of the land, so as to apply the rents and profits to the satisfaction of the debt; strict foreclosure, from which there would have been no redemption; or by simple foreclosure and sale, which last she did pursue, and it was only upon the last remedy that the statute operated, and not even upon that remedy, viz.: foreclosure and sale, until redemption expired and she was entitled to a deed which was on the 27th day of January, 1881. Then it was for the first time that the statute came into operation so far as the land or the parties or any contract was concerned.

But upon what did it operate? What did it affect? It is not until after she is entitled to a deed on the certificate of purchase the statute has anything to operate upon. It then says to her, you may take out a deed on your certificate of purchase at any time within the next five years, but if you fail to do so within the five years, your certificate shall be null and void. Remember, that before the statute had any person or thing to affect or operate upon, there had to be and there was a valid foreclosure, sale, and redemption had expired. By the foreclosure and sale the trust deed had expended its force and become functus officio. All contract obligations growing out of the trust deed had been fixed and determined by the court, and the trust deed itself merged or extinguished by the decree, and from the date of the sale, Mrs. Bradley's rights and interest in the land were measured by the certificate of purchase which she, through the aid of the court, invoked by her and Johnson, the trustee had called into existence. When she became the purchaser at the master's sale, she assumed a new relation to the property, in no wise dependent on privity of contract. She then stood in the same situation to the property as any stranger would have stood who might have purchased

at the sale. That we are correct in what we have said, we desire to call the court's attention to the decisions of the Supreme Court of Illinois in the cases cited in the V division of our brief. We will not take up the time of the court in reviewing all of them, but trust that this honorable court, if it has any doubt as to the effect of the foreclosure and sale upon the contract, rights and obligations growing out of the trust deed, and the relation which the plaintiff in error sustained to the property from and after the sale under the decree of foreclosure, will examine each and every case for itself.

In Smith *v.* Smith, 32 Ill., 198, the Supreme Court of Illinois, at its April term, 1863, held that where a mortgage or trust deed was given to secure several notes, due at different times, with authority to make sale of the premises upon the non-payment at maturity of any of the notes for the satisfaction of such of them as should then be due, if the mortgagee resorts to equity to foreclose, he could only obtain foreclosure for such of the notes as were then due, and a foreclosure in such case, for the part of the debts which was due, would extinguish the mortgage lien, and would of necessity be a release of the security for the amount not due.

In Seligman *v.* Laubheimer, 58 Ill., 124, decided at the January term, 1871, the court held that where there was a decree of foreclosure of a mortgage followed by a sale of the premises, and a certificate of purchase issued to the mortgagee, who became the purchaser at the master's sale, the mortgage lien was extinguished, although the mortgaged premises were bid off for only a small part of the amount found due the mortgagee by the decree.

To the same effect is the case of Rains *v.* Mann, 68 Ill., 264, decided at the June term, 1873. The rights of a mortagee, the effect of the foreclosure of a mortgage or trust deed in the nature of a mortgage and sale under the decree, and the relation which the mortgagee, who bid the property in at the sale, sustained to the property, etc., after the sale, was very fully passed upon by

the Supreme Court of Illinois in Ogle *v.* Koerner, 140 Ill., 170. We quote from the opinion, p. 179, 180: "A "mortgage, or in this case, a deed of trust, in the nature "of a mortgage, vests in the party secured a lien upon "the mortgaged premises. By virtue of that lien the "mortgagee is entitled to have the mortgaged prop-"erty sold under decree of foreclosure and the proceeds "of the sale applied to the payment of the debt secured. "This is the mode, provided by law, for the enforce-"ment of the lien, and when the lien has been once "enforced by sale of the property, it has as to such "property, expended its force and accomplished its "purpose, and the property is no longer subject to it." The court further holds that the amount bid, is the full equivalent for the satisfaction of the lien, notwithstanding it is only a part of the amount found due, and that the purchaser, although he is the mortgagee by the sale, becomes an entire stranger to the property.

In Davis *v.* Dale, 150 Ill., 239, 248, the Supreme Court in reviewing the law of Illinois relating to foreclosures, the effect, a foreclosure and sale had upon the mortgage lien, and the relation the purchaser at the foreclosure sale sustains, said: "By virtue of the lien "created, the mortgagee or cestui que trust had the "right to have the security foreclosed and the property "sold and the proceeds applied in payment of the "secured debt. But when this has been done and the "lien enforced by a sale of the property and the pro-"ceeds applied, the mortgage or trust deed has "expended its force and the property is no longer sub-"ject to its provisions. (Citing Ogle, et al. *v.* Koenner "et al., 140 Ill., 170; Seligman *v.* Laubheimer, 58 id., "124.) Nor does it in any way affect the result that "the holder of the secured indebtedness becomes the "purchaser at the sale, whether he be the mortgagee "or cestui que trust, or not. By becoming the pur-"chaser, a new relation created by the statute exists, "in no wise dependent upon any privity of contract "between the purchaser and mortgagor."

We desire to call the court's special attention to

Seeberger *v.* Weinberg, 151 Ill., 369, 380, 381, and Lightcap v. Bradley, 186 Ill., 510, 532 to 536, in which the law upon this branch of the case is carefully reviewed, and fully sustains our position. Furthermore, it is adhered to by the court, as the settled law of the State long before the date of the McCune trust deed.

When the decree is rendered, and sale made, how can it be otherwise than that the mortgage becomes functus officio, and all contract obligations terminate?

The purchaser get not the mortgage nor the debt; on the contrary, the money which is paid, if the purchaser be a third party, or if the purchaser be the mortgagee, or the creditor whose debt is secured, then the bid, wipes out and extinguishes the mortgage debt so far as the mortgaged property is concerned. Let us illustrate this hypothetically.

Suppose when the master in chancery exposed this land for sale, under the decree, John Smith, a stranger to everything connected with the contract or suit, had bid $10,000 instead of Mrs. Bradley and had paid the money into the hands of the master, received the certificate of purchase, and the sale had been approved. Is there any possible doubt but that the debt would have been paid so far as the land was concerned? Suppose further, Mrs. Bradley did not call upon the master for the money, and in the course of time, the mastered squandered it, and his bondsmen were worthless, and thereby Mrs. Bradley lost the money. Could she again set up any valid claim to the land? The debt was paid so far as the mortgage lien was concerned, when the supposed Smith paid the money into the hands of the master. It was no business of the purchaser, or the debtor to see that the master paid it over to Mrs. Bradley, and from the Illinois authorities cited under divisions III, IV and V of our brief, the court will find the law of Illinois is now and ever has been, that the payment of a debt extinguishes the mortgage, also that when land is sold under foreclosure, whether it sells for the full amount of the debt, or only a portion of it, the mortgage is extin-

guished, and the land can not again be resorted to for any deficiency. We submit there can be but one answer to the question, viz.: she would have no further claim upon the land and must stand the loss. But what does John Smith, the purchaser get? He certainly does not get the debt, because that is paid, and he does not get the mortgage, because that is extinguished, and the only answer is, he gets a certificate of purchase which the statute of the State gives him through the master in chancery which certificate, if redemption be not made, and he complies with the requirements of the statute in relation thereto, will entitle him to a deed which will vest in him the title to the land; but he has no title under the certificate and none vests in him until the deed is made. (See authorities Illinois cases, Brief III, IV and V. The relation which he would sustain to the mortgagor and the land does not depend on any contract, but arises out of the statute. The statute of the State tells him what he shall get, how he shall get it, what he must do to get it, and what will be the effect if he fails to observe the statute in reference to the same. And when Mrs. Bradley became the purchaser at the sale, she thereafter occupied the same relation, to Prettyman, the grantee of the mortgagor and the land, that the supposed John Smith, or any stranger would, had they been the purchaser. Such has been the constant holding of the Supreme Court of the State, as that court says: "She could have no other or different right "under her purchase than any other purchaser. If "some other person had purchased the premises, no one "would say that such purchase acquired any right "except under the certificate of purchase, and it can "not be that the mortgagee has any other or different "or better title than any other purchaser. It would "be destructive to the fairness and "equality of such "sales that the mortgagee should acquire a better title "or should have any advantage as bidder over any "other person."

VI.

When this case is carefully examined, it will be found the grounds relied upon for invoking the jurisdiction of this court are substantially that the Supreme Court of Illinois misconstrued or wrongly interpreted the general local law of the State relating to mortgages, their foreclosures, its effect, the relation and rights which the holder of a certificate of purchase and the mortgagor respectively hold and sustain to the property and to each other, after the sale by the master, and also that a wrong construction and application of the statute complained of was made by the court.

The case is quite like the case of Central Land Company of West Virginia *v.* Laidley, 159 U. S., 109, in which this court, speaking through Mr. Justice Gray, said: "In order to come within the provision of the "Constitution of the United States which declares that "no State shall pass any law impairing the obligation "of contracts, not only must the obligation of a contract "have been impaired, but it must have been impaired by "some act of the legislative ~~from or~~ of the State, and not "by a decision of its judicial department only. * * * "As was said by this court, speaking by Mr. Justice "Grier in such a case as long ago as 1847: 'It is the "peculiar province and privilege of the State courts to "construe their own statutes; and it is no part of the "function of this court to ~~reverse~~ their decisions, or as-"sume jurisdiction over them on the pretense that their "judgments have impaired the obligations of contracts. "The power delegated to us is for the restraint of uncon-"stitutional legislation by the State, and not for the cor-"rection of alleged errors committed by the judiciary.' "* * * It is said by Mr. Justice Miller, in deliver-"ing a late judgment of this court: 'We are not au-"thorized by the judiciary act to review the judgments "of State courts, because their judgments refuse to give "effect to valid contracts, or because those judgments, "in their effect, impair the obligation of contracts. If "we did, every case decided in a State court could be

"brought here, where the party setting up a contract, "alleged that the court had taken a different view of "its obligation to that which we held.' Knox *v.* Bank, "12 Wall, 379, 383. The same doctrine was stated by "Mr. Justice Harlan, speaking for this court as follows: " 'The State court may erroneously determine questions "arising under a contract which constitute the basis of "the suit before it; it may hold a contract void which, "in our opinion, is valid, or its interpretation of the con- "tract, may in our opinion, be radically wrong; but in "neither of such cases, would the judgment be reversi- "ble in this court under the clause of the Constitution "protecting the obligation of contracts against impair- "ment by State legislation, and under the existing "statutes defining and regulating its jurisdiction, un- "less that judgment in terms, or by necessary operation, "gives effect to some provision of the State Constitution, "or some legislative enactment of the State which is "claimed by the unsuccessful party to impair the obliga- "tion of the particular contract in question."

The other authorities cited in our brief are equally as strong.

The case at bar was twice before the Supreme Court, and will be found reported in 186 Ill., 510 as Lightcap *v.* Bradley and the last time as Bradley *v.* Lightcap, 201 Ill., 511.

The decisions of the Supreme Court, in both cases, as to the effect of the mortgage or trust deed to Johnson the trustee; the nature and character of the title or interest it conveyed; how it was regarded by the law of Illinois; what title and estate still remained in McCune, or his grantee, Prettyman; the effect of a valid foreclosure and sale upon the rights and liabilities growing out of the trust deed and the trust deed itself, when and by what means the contract obligation terminated; what relation the plaintiff in error assumed when she became the purchaser at the master's sale; and the nature, character, and effect of the certificate of purchase, were based entirely upon the local law of the State. There is nothing to be found in either

opinion where the court applied the statute complained of to any of these questions. In the last opinion in the Supreme Court, 201 Ill., 519, the court speaking by Mr. Justice Cartwright, said: "She adopted the method "of an ordinary foreclosure, and the statute did not "operate upon that remedy until after the decree and "sale, when the contract right had been fixed and de-"termined by the court and the contract created by the "trust deed had come to an end, so far as the land was "concerned. When the defendant (plaintiff in error) "purchased the land at the sale, under the decree, she "assumed an entirely new relation arising out of the "statute and not depending on any privity of contract. "The sale discharged the land from the trust deed and "transferred the lien created by the contract into a "statutory lien by the certificate of purchase, and the "land was released as security for the balance of the "debt. (Smith *v.* Smith, 32 Ill., 198; Seligman *v.* Laub-"heimer, 58 Ill., 124; Ogle *v.* Koerner, 140 Ill., 170; "Davis *v.* Dale, 150 Ill., 239.) This new relation came "into existence by the purchase at the master's sale on "Oct. 27, 1879, seven years after the passage of the act "in question, and that relation was the same in defen-"dant's (plaintiff in error) case as it would have been "if some other person had been the purchaser." At page 524, the court says: "Under repeated decisions, the in-"terest of the defendant (plaintiff in error) in the "premises after her purchase, was only such as the cer-"tificate of purchase gave her."

It will be observed that the section of the statute complained of does not provide for the issuing of the certificate of purchase, and does not operate upon anything until the certificate is issued, and not even then until redemption expires. Section 16 of the same statute is that which provides for issuing the certificate, and not until Section 16 had been complied with was there anything in existence upon which Section 30 could operate, and the Supreme Court did not apply it to anything except the certificate after all contract obligations had

terminated and the rights of the parties had become fixed in accordance with the general law of the State.

It is true, that Section 30, which is complained of, was enacted in 1872, and subsequent to the McCune trust deed, and also that the Supreme Court held it to be a statute of limitation as it undoubtedly is, and upholds its validity, and applies it as a limitation statute in this case, but the court does not apply it to a contract obligation or anything that was in existence when the statute went into force and effect. On the contrary, the court expressly decides that all contract obligations had terminated and ceased to exist, and a new relation had been assumed in no wise depending on contract, but growing out of the statute of the State, before the section complained of operated. We do not understand that this court is authorized or assumes to review the judgment of State courts, merely because a statute, which effects only the remedy, in no wise impairing a contract obligation, and giving a reasonable time to the party affected to pursue his remedy, is enacted subsequent to the date of the contract. On the contrary, it is only when the subsequent legislation strictly impairs the obligation, or under the guise of regulating the remedy, does impair the obligation, that this court is authorized to review the judgment of the State court under or by virtue of the constitutional prohibition against the impairment of contract obligation, and as her relation and rights as purchaser at the master's sale, and as holder of the certificate of purchase were acquired under the statute seven years, three months and twenty-six days after the statute took effect and gave her five (5) years after redemption expired to obtain a deed to the land we think this court, like the Supreme Court of Illinois, will find some difficulty, in the light of adjudged cases, in holding ~~the law of~~ the statute deprived her of property without due process of law or that the State Supreme Court wrongly interpreted or applied the law

(For further discussion and authorities regarding the Fourteenth Amendment see post X.)

VII.

It is insisted that the plaintiff in error had an equitable title such as is required by Section 4 of Chap. 83. Starr and Curtiss annotated statutes of Illinois, which reads as follows:

"Actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual residence thereon for seven successive years having a connected title in law or equity of record from this State or United States, or from any public officer or other person authorized by law of this State to sell such land on execution or under any order, judgment or decree of any court of record shall be brought within seven years next after possession taken as aforesaid; but when the person shall acquire such title after taking such possession the limitation shall begin to run from the time of acquiring title."

We fail to see any foundation for the plaintiff's in error claim under this statute as we think the court will find when it comes to examine the authorities relied upon, ~~in the court below~~. We will, however, call the court's attention to a few principles of law. There never has been a time in the history of the jurisprudence of Illinois when a certificate of purchase constituted title or even color of title to lands sold by sheriff, master in chancery or other person under and by virtue a judgment or decree, nor does such certificate ever operate to pass title or give right of possession at any time. Under this section of the statute the party who relies upon it as a defense must show a higher and better title than is required by Section 6 of the same statute which only requires "color of title" and under Section 6 the Supreme Court of Illinois has invariably held that a certificate of purchase is not even color of title; and under Section 4 which plaintiff in error relies upon. It has been uniformly held by the court that, in connection with the other requirements of this section, the title which is required by it must be a "*prima facie* good title." The certificate only operates as a lien by way of

action to protect the purchaser, whoever he may be, against intervening claims, as was said in Smith *v.* Colvin supra. "The title does not pass by filing the sheriff's certificate, which only operates as a lien by way of action to protect the purchaser against intervening claims except the right of redemption. Nor does the estate of the debtor become vested in the purchaser by mere lapse of the time of redemption, but only as we think by the sheriff's conveyance under the statute. This mode of transferring title to real estate is in derogation of law which requires the owner's consent, and the statute should be strictly construed, or in other words, title should not be regarded as divested or transferred by sale alone unless such is the plain import of the statute. Before conveyance the purchaser could not maintain ejectment to obtain possession, and *pari ratione* he can not defend a possession obtained against the consent of the debtor."

The title which is required under this section of the statute was passed upon by this honorable court in Moore *v.* Brown, 52 U. S. (11 How.), 414. Speaking of this statute through Mr. Justice Wayne this court said: "The legislature intended to extend its protection to persons who occupied land under a connected title *prima facie* good, against proof *aliundi* which would rebut or destroy such *prima facie* title," and this is the construction which the Supreme Court of Illinois has ever given to it. See Elston *v.* Kennicott, 46 Ill., 207, the opinion rendered on the rehearing of that case.

This section of the statute was borrowed from the statute of Kentucky, and the Supreme Court of that State in Sikes Heirs *v.* Kings Heirs, supra, in passing on the question as to what kind of a title the statute required said: "A connected title in law or equity from the commonwealth does and must mean such a title when tested by its own face and not tried by the title of others."

The court will readily see from the authorities cited under diversions III and IV, of our brief, that a certificate of purchase neither gives the holder of it title or

right of possession, either before or after redemption expires; but, for the sake of argument, suppose the certificate of purchase after redemption expired was a *prima facie* title during the five years in which she had the right to take out a deed, when she lost her right to a deed, which would convey to her the legal title, by the bar of the statute she no longer had any equitable title. It is said in the argument filed for plaintiff in error "a purchaser has a complete equitable title when he is entitled to and may *compel* a conveyance, and plaintiff in error had a right to a deed, and so had to complete equitable title when the time for redemption had expired, and she became entitled to the master's deed."

If this was true, still the conditions of the statute is not fulfilled. The equitable title, i. e., a *prima facie* good title must continue seven years, as well as the possession of the land, and in accordance with their own claim of what it takes to constiute an equitable title when she could no longer "compel a conveyance" she no longer had a *prima facie* title.

But we are not without direct authority on this much disputed question concerning her alleged vested right and title. Ryhiner *v.* Frank, 105 Ill., 326, was an action of ejectment. Ryhiner commenced an action of ejectment against Frank to recover certain lots in Effingham. One Newbank was the common source of title. One source of the plaintiff's title was a sheriff's deed executed to him on a certificate of purchase from the sheriff who had sold the lots under execution issued on a judgment *v.* Newbank rendered on the 6th of March, 1871, upon which execution issued and the land sold Aug. 7, 1871, the judgment was rendered while he owned property, and prior to a trust deed which he gave on the property. The property was sold under the trust deed and the defendant connected himself with the title under this sale. No deed was taken out on the sheriff's certificate of purchase until Dec. 21, 1878, at which last date Ryhiner, to whom the certificate of purchase had been assigned, received a sheriff's deed. This was upward of five years and ten months after the expiration

of the time of redemption, and the objection was made in that case as in this, only with much stronger reasons that the statute did not and could not apply, that rights were vested in the holder of the certificate prior to the passage and taking effect of the statute. And that as the sale was made and certificate issued in 1871, nearly a year before the act of 1872 went into effect, and at that time there was no express limitation limiting the time when deed could be taken out, and as the court had declared, Rucker *v.* Dooley a deed might be issued at any time within eight years and three months after sale, or seven years after expiration of redemption to apply the statute of limitation subsequently prescribed deprived the holder of the certificate of vested rights; but the court held otherwise. Mr. J. Sheldon, speaking for the court as a unit said (330):

"The objection is not valid that the statute fixes a limitation for taking out the deed, different from that declared by this court in Rucker *v.* Dooley, 49 Ill., 383, and that the judgment and sale under it were prior to the passage of the statute. The statute was one of limitation and effected only the remedy. It took away no vested right and like all other statutes of limitation, was free from objection on this score, where a reasonable time, as was the case, here is left for the pursuit of the remedy. It was surely competent for the legislature to change the time of limitation which had previously been declared by this court."

Again in Peterson *v.* Emmerson, 135 Ill., 55, 59, 60.

This was a bill in chancery by Elizabeth Emmerson to compel the master in chancery to execute a deed on a certificate of purchase which had become barred by this same section of the statute which bars the plaintiff in this case.

In 1865 one Peterson, the then husband of Mrs. Emmerson, gave a mortgage to one Emmerson on 40 acres of land to secure an indebtedness. She joined in the execution of the mortgage. Peterson died in 1866 leaving his widow and two children by a former wife, a son and daughter, the daughter married Hiram

Smith, and died leaving an infant child in 1867. Peterson's widow married Emmerson, the mortgagee. She resided on the land during her widowhood and for a time after she married Emmerson, when they moved off of it. In 1871 Emmerson foreclosed his mortgage and on November 25, 1871, the master in chancery sold the land under the decree of foreclosure and Mrs. Emmerson bid it off and received the certificate of purchase. In 1872 she took possession of the premises and continued in possession, received the rents and profits, and paid all taxes, and was in possession at time she filed her bill, but no deed was ever executed on the certificate of purchase. Fifteen years, 10 months, and 11 days elapsed after the expiration of the period of redemption, and the filing of the bill.

It was urged (see Ab. of Argument, pp. 56, 57) that the statute of 1872 did not apply because the sale was made and certificate of purchase issued before the statute was enacted; also that the rights of the parties were not affected or changed by the decree of foreclosure and sale thereunder. That the decree of foreclosure was still in force and that the title of the heirs of the mortgagor were divested by their failure to redeem, that even if the certificate of purchase was dead for the purpose of getting a deed, still the whole suit of foreclosure, decree and sale was left unimpaired. That Mrs. Emmerson had everything she needed including the possession of the land except the evidence of her title. That she was the owner of the property in equity, but lacked evidence of it. The circuit court sustained her contentions, and the heirs of the mortgagor took the case to the Supreme Court of the State. Mr. Justice Baker delivered the unanimous opinion of the court and after reaffirming what was said by the court in Ryhnier *v.* Frank *supra* said pp. 59, 60: "It is also urged that it lies within the general equity powers of the chancery court to order and decree that the master should execute and deliver to defendant in error a conveyance of the land, predecated upon the foreclosure sale of November, 1871, and

Rucker *v.* Dooley, 49 Ill., 377, and Schrader *v.* Peach, 77 Ill., 615, and cited as authority in that behalf.

Rucker *v.* Dooley was decided prior to the enactment of 1872 and when there was no express legislation on the subject, and the court there formulated, based upon the analogies of the law, a rule which it deemed equitable and just. That rule was, that the lapse of twenty years from the date of sale and certificate was an *insuperable* bar to the execution of a deed; that after the expiration of fifteen months allowed for redemption, and within eight years and three months from the date of sale, a deed should be made by the proper officer upon presentation of the certificate of purchase, and that after the eight years and three months had elapsed and within twenty years a deed *might* be made upon an order of court entered after notice to parties interested. But this rule was abrogated by the legislative enactment of 1872, not only in respect to the period of limitation, but also by the provision that if a deed was not taken out within the time limited, the certificate should be null and void. It is sticking in the bark to say, that notwithstanding the certificate is null and void, yet the *sale* which it was given to evidence has such vitality and force that a court may decree, by virtue thereof, the preemptory and absolute transfer by its officer of the property and title of one person to another and different persons. It does not alter the case that defendant in error has been in actual possession of the land since 1872 claiming ownership and has paid all the taxes assessed thereon. Such acts do not take the case out of the statute as to justify the transfer to her of the legal title vested in the heirs of the mortgagor."

The question was before the Supreme Court again in Seeberger *v.* Weinberg, 151, Ill., 369, 373-4, 380-1.

It was a bill in chancery by Seeberger, against the heirs of the mortgagor and other parties. The substantial facts so far as this case is concerned are as follows. Seeberger being the owner of the lot in controversy conveyed the same to one John Farr, on June 3,

1872, for $1,700. $900 of the purchase price was secured by Farr executing three notes to Seeberger for $300 each, and secured the same by trust deed on the lots to one Hodges as trustee. In 1873 Farr conveyed the lots to his wife, Sarah Ann Farr, and subsequently died. Default was made in the payment of the notes and a bill in chancery to foreclose the trust deeds was filed upon which a decree of foreclosure, was entered in January, 1876; under this decree the lots were sold by the master in chancery February 14, 1876, and Seeberger, the *cestui que trust*, bid the same off, became the purchaser, and received the master's certificate of purchase. No redemption was made, and no deed taken out on the certificate of purchase. From the date of the sale, however, Seeberger claimed the lots and paid all taxes and assessments thereon and built sidewalks on the street adjacent thereto. In 1892 Seeberger contracted to sell the lots to Fanny Weinberg, part of the purchase price was paid and Seeberger was to furnish an abstract of title so that Mrs. Weinberg could have her attorneys examine the same, which was done, and the attorneys discovered that no deed was ever taken out on the certificate of purchase, and so informed Seeberger. Mrs. Weinberg then proceeded to get a deed for the lots from Mrs. Farr and the heirs of the mortgagor, and thereupon Seeberger filed his bill setting up the facts and claiming to own the property, &c., &c. The bill was heard on pleadings and proof and the lower courts dismissed the bill and on appeal to the Supreme Court the decree was affirmed. Mr. Justice Bailey delivered the unanimous opinion of the court, and after referring to the statute and to the prior decisions of the court said:

"After the expiration of five years given by the statute for taking out a master's deed, the certificate of purchase became a nullity, and a court of equity can not compel, or authorize, the execution of a deed to the purchaser or his assignees by the officer whose duty it is to make such deed. Such being the condition of Seeberger's title it is difficult to see upon what legal or equitable principle he can now be entitled, as against the

grantees of Farr to any portion of the relief prayed for in the bill. His certificate of purchase being *functus officio* and void, he certainly could have had no remedy against the heirs or representatives of Farr if they had still retained their interest. No remedy could have been asserted by him upon the certificate as that had become a nullity, nor could he have enforced any remedy upon the original mortgage as that remedy had been completely exhausted by the foreclosure and sale. Here the interest in the land acquired by Seeberger by means of his purchase at the foreclosure sale, and evidenced by the certificate of purchase, having been barred by limitation, the only title to the property capable of assertion was that remaining in the grantee or legal representative of Farr, the mortgagor. If Mrs. Weinberg had not succeeded in securing the title by purchase from those in whom it was vested, it might have been asserted by them, or purchased by some third party to the exclusion of both her and Seeberger."

Again, in Brown *v.* Ridenhower, 161 Ill., 239. This was a bill in chancery to set aside two deeds under following state of facts. In 1858 one James Finney being the owner of the land executed a mortgage thereon to one Misenheimer to secure the payment of $127.50. In 1863 Misenheimer filed a bill to foreclose the mortgage, and obtained a decree and one Graham was appointed a special commissioner to sell the land, which he proceeded to do on Sept. 5, 1863. Misenheimer was the highest bidder and secured the certificate of purchase, and the special commissioner made a report of the sale, which was approved. Finney died in March, 1866, without having redeemed the land from the sale. No master's or commissioner's deed was ever issued. Ridenhower was in possession of the land holding the same under a regular chain of conveyances from Misenheimer. In 1892 the heirs of Finney, the mortgagor, conveyed the land to Brown and the bill was filed to set aside this deed as a cloud upon ~~Misenheimer's~~ title, and the court held, Mr. Justice Magruder delivering the opinion, that the holder of the certificate had no title in

law or equity to support the bill, and reverse the decree of the lower court granting the relief, and in doing so quoted with approval what was said by the court in Seeberger *v.* Weinberg, and said "whether the lapse of time is to be given the effect of extinguishing his right, or merely barring his remedy, he has no further title or interest in the premises described in the certificate which either he or his grantee can enforce either in law or in equity."

The statute complained of has been in force for nearly a third of a century, and for more than one-third of the existence of Illinois as a State. One and only one construction has ever been given to it, viz.: as a limitation statute, and no other effect has ever been given to it in this case or any other, and as was said by this court in Saranac L. Co. *v.* Carpenter, 177 U. S. "a statute of limitation will bar any right, however high the source from which it may be derived, provided a reasonable time is given a party to enforce his right."

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VIII.

It has been the constant and consistent holding of this honorable court that the construction of State law by its highest court as to property, the interpretation of State statutes, their application to things, the construction of State constitutions, the validity of statutes, what are rights (exceppt under commercial law of general application), is exclusively with State courts, and that this court will follow their decisions unless clearly violative of federal law.

This is particularly true upon questions affecting the title to real property. In a very recent case, Clarke *v.* Clarke, Mr. Justice White, in delivering the opinion of this honorable court said: "It is a principle firmly established, that to the law of the State in which the land is situated, we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances;" citing numerous authorities.

Again in Arndt *v.* Griggs, Mr. Justice Brewer said: "The power of the State to regulate the tenure of real "property within her limits, and the modes of its ac- "quisition and transfer, and the rules of its descent, "and the extent to which a testamentary disposition "of it may be exercised by its owners is undoubted. It "is an established principle of law everywhere recog- "nized, arising from the necessity of the case, that the "disposition of immovable property, whether by deed, "descent, or any other mode, is exclusively subject to "the government within whose jurisdiction the prop- "erty is situated."

The strictness with which this rule is adhered to by this honorable court is well stated in the case of Forsyth *v.* Hammond, 166 U. S., 518. In that case, it is said: "The construction by the courts of a State of "its constitution and statutes, is as a general rule "binding on the federal courts. We may think that "the Supreme Court of a State has misconstrued its "constitution or its statutes, but we are not at liberty "to therefore set aside its judgments. That court is "the final arbiter as to such questions."

IX.

Let us examine this case under the IX division of our brief. Turning to the opinion of the Supreme Court of Illinois, we find this case was twice before that court on its merits, once under the title of Lightcap *v.* Bradley, reported in the 186 Ill., 510, and the last time, entitled Bradley *v.* Lightcap, reported in the 201 Ill., 511.

The first time it was before the Supreme Court, the judgment of the trial court was reversed and the cause remanded to the lower court "For further proceedings in accordance with the views expressed in the opinion then filed." This, the trial court, proceed to do on the last trial in that court. The plaintiff in error, not being satisfied with the judgment, appealed the case to the Supreme Court. Now when it came before that court

the second time, the Supreme Court found there was no change in the evidence which altered or affected the rights of the parties in any way or manner whatever from what they were the first time the case was presented, and that every proposition of law and every question presented on the second appeal, was, or might have been presented upon the record in the first appeal and was therefore *res adjudicata*. We quote the language of the court (P. R., p. 260): "On the last trial, the evidence respecting the title of the parties was the same as upon the first trial, as contained in the record, which was reversed in Lightcap *v.* Bradley, supra, and every proposition of law now raised, arose upon the former record. There is no question presented or discussed on this appeal, either relating to the propositions of law submitted to the trial court, or assignment of errors, or in the argument of counsel, that could not have been properly raised on the former record. The decision at that time settled every question which might have been raised and every objection which might have been made, whether then raised and made or not. The doctrine of *res judicata* embraces not only what was actually determined in a former suit, but also extends to any other matter which might have been raised and determined in it. Harvey *v.* Aurora & Geneva Railway Company, 186 Ill., 283. Pease *v.* Ditto, 189 Ill., 456. A litigant can not be allowed to have his case heard in this court, partly at one time and partly at another."

What the Supreme Court of Illinois here decided was alone sufficient to dispose of this case, and it is no answer to what we are now discussing and contending for to say that the Supreme Court went beyond what was necessary to a complete disposition of the case and decided a federal question erroneously or otherwise. As we understand the law and rule governing this court where a case is brought before it for review by writ of error to the highest court of a State, it is not sufficient to warrant a reversal of the State court that there is a federal question involved, and that the State court has

erroneously decided the same, but it is essential that the federal question be the controlling factor and alone sufficient to dispose of the case, and for the purpose of determining whether or not the federal question is alone sufficient to dispose of the case, this court will further examine the case to ascertain if the decision of the State court, based on other matters in the record, is sufficiently broad to maintain its judgment.

In the case of Murdock *v.* The Mayor & Aldermen of the City of Memphis, 20 Wall, 590, this court speaking through Mr. Justice Miller lays down several rules or propositions as flowing from the statute by means of which this case is brought before the court. We believe these rules or propositions, have been consistently followed by this court and can be taken as safe guides by attorneys, in presenting their cause to the court. They are as follows:

"1. That it is essential to the jurisdiction of this court over the judgment of a State court that it shall appear that one of the questions mentioned in the act must have been raised and presented to the State court.

"2. That it must have been decided by the State court, or that its decisions was necessary to the judgment or decree rendered in the case.

"3. That the decision must have been decided against the right, claimed or asserted by plaintiff in error, under the constitution, treaty, law or authority of the United States.

"4. These things appearing, this court has jurisdiction and must examine the judgment so as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

"5. If we find that it was rightly decided, the judgment must be affirmed.

"6. If it was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged to the State court which is sufficiently broad to maintain the judgment of the court notwithstanding the error in deciding the issue raised by the federal question. If this is found

to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

"7. But if it is found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of the court, without regard to the federal question, then this court will reverse the judgment of the State court and will either render such judgment here as the State court should have rendered, or remand the cause to the State court as the circumstances of the case may require."

We believe these several rules or propositions have been constantly and consistently adhered to by this court and no one of them with greater strictness than the 6th. In a very recent case, California Powder Works *v.* Davis, 151 U. S., 389, this court, through its distinguished Chief Justice, reiterates it in these words: "It is axiomatic, that in order to give this court jurisdiction on a writ of error to the highest court of the State in which a decision in the suit could be had, it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered, could not have been given without deciding it, and when the decision complained of rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, a writ of error will be dismissed by this court, without considering the federal question, which may also have been presented."

Applying these principles of law to the case at bar and what is there left of the plaintiff's contention? We believe this court will agree with us that the Supreme Court of Illinois made no error in holding the statute complained of to be constitutional, but suppose it erred, how does it help the plaintiff's case? It certainly will

not be contended that the doctrine of *res adjudicata*, which the court applied to this case, presents a federal question, or that this court is at liberty to overrule the State court in applying it to this case. It is a principle of law too firmly established in the jurisprudence of Illinois to be lightly overthrown, that not only every proposition of law and questions raised or discussed on the first appeal, but every question that might have been raised and passed upon, but was not, can not be raised on a second appeal, but will be considered as having been waived by the party who seeks to raise it for the first time in that court on a second appeal; as the court said in its opinion: "A litigant can not be allowed to have his case heard in this court partly at one time and partly at another."

The doctrine of *res adjudicata* which was applied by the Supreme Court when this case was before it, is sufficiently broad to maintain its judgment and the alleged federal question is not necessarily the controlling factor neither is it "alone sufficient to dispose of the case."

X.

We submit that there is absolutely no foundation in this case to support the contention of the plaintiff in error, that the statute complained of, or the decision of the Supreme Court violates the Fourteenth Amendment to the U. S. Constitution or Sec. 1979 of the U. S. Revised Statute.

The provision that no State shall deprive any person of his property "without due process of law" is not an inhibition on State legislation. "Due process of law" and "the law of the land" have the same meaning.

Legal proceedings, according to the rules and forms which have been established for the protection of private rights, binding alike upon all, is due process of law. It will not be, at least in reason it can not be, contended but that plaintiff in error pursued the usual, well known and most frequently used means to enforce the mortgage

lien, or that the court denied her any right she was entitled to, under the law, but on the other hand, the court proceeded to carry into effect its decree, and through his sworn office, the master in chancery made the sale. The certificate of purchase, which gave a lien upon the land for the amount of the bid, was all the court could give her or any person. Now there has ever been a limitation upon the lien and rights given by a certificate of purchase. This is settled by the case of Rucker *v.* Dooley, 49 Ill., 378, and Harmon *v.* Larned, 58 Ill., 167. The Supreme Court did not make the law in those cases, but merely declared what it was, and applied it. The plaintiff in error cites the former case with approval, and argues that at least she should have the same limitation applied to her case, and if she does not, then not only the obligation of the contract is impaired, but also she is deprived of her property without due process of law.

We do not understand that the Fourteenth Amendment undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced or lost, provided the method adopted gives a reasonable opportunity to the party affected to assert his rights before they are lost.

The rights of a State to pass statutes of limitation and to change existing limitation laws, existed long prior to the adoption of the Fourteenth Amendment. It is part of the police power which belongs to the State, and although rights might be lost which but for the statute would continue to exist, still it was a method which the law recognized, and if the statute allowed a reasonable time to enforce the right before the bar took effect, it was in accordance with the law of the land or "due process of law."

Wheeler *v.* Jackson, 137 U. S., 245.
Terry *v.* Anderson, 95 U. S., 628.
Saranac Land Co. *v.* Roberts, 177 U. S., 318.

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We do not know that we can shorten this argument more, or do better, than to briefly call the court's atten-

tion to some of the cases where the court has been called upon to define and place construction on this amendment, and to determine to what extent it limits the power of a State to legislate.

In Caldwell *v.* Texas, 137 U. S., 697, this court speaking through its learned Chief Justice, said: "due process is secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of Government unrestrained by the established principles of private rights and distributive justice."

Again in Grozzar *v.* Tiernan, 148 U. S., 661, speaking through the same learned judge, this court said: "Irrespective of the operation of the Federal Constitution, and restrictions asserted to be inherent in the nature of American Institutions, the general rule is that there are no limitations upon the legislative power of the State, except those imposed by its written constitution. * * * The amendment (14th) does not take from the States those powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights. * * * It is enough that there is no discrimination in favor of one and against another of the same class (citing numerous authorities), and due process of law, within the meaning of the amendment, is secured if the law operates on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

These principles were repeated by this court substantially in Leeper *v.* Texas, 139 U. S., 462.

In Iowa Central Railroad Company *v.* Iowa, 160 U. S., 393, speaking through Mr. Justice White, the court said: "It is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted for these purposes give reasonable notice and afford a fair opportunity to be heard before

the issue is decided," and the court further said: "Whether the court of last resort of a State has properly construed its own constitution and laws in determining that a summary process under those laws was applicable to the matter which is adjudged, is purely a question of State law binding upon this court."

In Davidson *v.* New Orleans, 96 U. S., 102, it was held that: "due process of law" does not necessarily imply a regular proceeding in a court of justice, nor after the manner of such courts."

We invite the attention of the court to what was said in the case of the Missouri Pacific Railroad *v.* Humes, 115 U. S., 512, 518. Mr. Justice Field delivered the opinion, after referring to the fact that similar provisions were to be found in the constitution of every State as that found in the Fourteenth Amendment, that the same meaning must be given to the words "due process of law," and that it would be difficult and perhaps impossible to give to these words a definition broad enough to cover every case, said: "In England the requirement of due process of law in cases where life, liberty and property were affected, was originally designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law. The words were held to be equivalent of 'law of the land.' And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended in addition to other guaranties of private rights to give increased security against the arbitrary deprivation of life, liberty and the arbitrary spoliation of property. But from the number of instances in which these words are invoked to set aside the legislation of the States, there is abundant evidence as observed by Mr. Justice Miller in the case referred to (Davidson *v.* New Orleans, 96 U. S., 97), 'that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment.' It seems, as he states, to be looked upon as a means of bringing to the test of the decision of this court, the abstract opinions of every unsuccessful litigant in a State

court, of the justice of the decision against him, and the merits of the legislation on which such decision may be founded * * *.

"If the laws enacted by a State be within the legitimate sphere of legislative power and their enforcement be attended with the observance of those general rules, which our system of jurisprudence prescribed for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."

In Minneapolis Railroad Co. *v.* Beckwith 129, U. S., 26, 29, the court says: "The Fourteenth Amendment does not limit, nor was it designed to limit the subjects upon which the police power of the State may be exerted."

We will now ask the Court's attention to one other case decided by this court, that of Hurtado *v.* People, 110 U. S., 516, where this court, speaking through Mr. Justice Matthews, said: "Due process of law in the Fifth Amendment referred to the law of the land which derives its authority from the legislative power conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed and interpreted according to the principles of the common law. In the Fourteenth Amendment by parity of reasoning it refers to the law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exercised within the limits of those fundamental principles of liberty and justice which lies at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."

We call the court's attention to a decision of the Supreme Court of Illinois bearing on this same question.

Stearns *v.* Gittings, 23 Ill. 387, was an action of ejectment. (It is one of the three cases cited by plaintiff in error as Newland *v.* Marsh, 19 Ill., 379, the three cases being heard and reported together.) Stearns brought

ejectment against Gittings. The plaintiff showed a regular chain of title from the United States and Gittings, the defendant, rested his defense on a tax deed as color of title and seven years' payment of taxes under the second section of the Act of 1839, the same being Sec. 7 of Chapter 83 of the present statute of Illinois. The section provides: "Wherever any person having color of title made in good faith to vacant and unoccupied lands, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal ownr of said vacant and unoccupied lands to the extent and according to the purport of his or her paper title," &c., &c. On the second trial of the ejectment suit the defendant defeated the plaintiff under this section of the statute, and the plaintiff appealed to the Supreme Court, and it was insisted the statute was unconstitutional as controvening that clause of the State constitution which provided: "That no freeman shall be imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the judgment of his peers or the *law of the land*."

It was contended that to hold this statute valid and thereby the plaintiff lost his land, was to deprive him of his property contrary to the law of the land and without the judgment of his peers, but the court held the law was a limitation act, and valid, and in doing so said: "This act like all other limitation laws, does not transfer the title of the owner to the defendant, but simply prohibits him, after the bar of the statute has become complete, from asserting his rights. The statute creates the bar, and the court prohibits the owner from asserting his rights against it. Whilst it is usual in framing limitation acts which bar the entry, or the right of recovery, to make possession the most important requirement in the creation of the bar, yet no decision of which we are aware has ever held that possession is essential to the constitutional validity of such enactment. That the act should afford reasonable time

and opportunity for the assertion of the right before barring the remedy for laches and non-assertion of the right within the limited period, is believed to be all the constitution requires. The terms and conditions upon which the bar may become complete in other respects must necessarily be left to the discretion of the legislature."

Judge Cooley in his excellent work on Constitutional Limitation, p. 434 (6th Ed.), says: "Due process of law in each particular case means such an exertion of the power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs," and he cites a large number of authorities in support of this.

If then the Fourteenth Amendment did not take from the State of Illinois the right to exercise the powers of government, and to legislate and enact laws for the benefit, welfare and interest of its citizens, so long as its acts were not arbitrary and oppressive, and there was no discrimination in favor of one as against another of the same class, and there was a reasonable time given for the individual to comply with its laws, how can it be said that this statute, or the construction the Supreme Court of Illinois gave it, violates the Federal Constitution? The legislature of the State was not only reasonable, but it was indeed liberal in the time it gave for obtaining a deed on a certificate of purchase. The legislative body owed it as a duty to the people which it represented, to prescribe a reasonable limitation beyond which a certificate of purchase should cease to be a lien, rendering the title to land uncertain, practically taking it out of the market and standing in the way of free and ready sale and transfer.

The plaintiff in error had five years after redemption expired in which to present her certificate to the master in chancery, receive her deed and become vested with the title to the property. If the master refuses to execute the deed, the courts of the State were open to

her to compel the master to execute it, besides, if the deed was wrongfully withheld by the officer whose duty it was to execute it, the time during which the deed was wrongfully withheld constituted no part of the five years necessary to complete the bar. That she did not obtain the deed and become vested with the title to the land was no fault of the statute or law. For five years the right rested with her to demand it, during all of which time the courts of State stood ready to assist her. The court could not compel her to take the deed and thereby become vested with the title, but it could compel the execution of the deed to her if she asked for it. She did not see fit to ask for one; she would not even stretch forth her hand and present her certificate of purchase to the master that he might execute to her the deed it called for, and she now has no one nor any law upon which to cast blame, except herself.

XI.

That the decisions of the Supreme Court of Illinois, to which we have directed this honorable court's attention, in the authorities we have cited in our brief, have established rules of property, which if regarded by this court, are decisive of this case, and upon which the judgment must be affirmed, we entertain no doubt, it has been the constant and consistent holding of that court.

First. That the title conveyed by a mortgage is in the nature of base or determinable fee; that the term of its existence is measured by that of the mortgage debt.

Second. That the mortgagor is the real owner of the land for all purposes, subject only to the lien of the mortgage.

Third. That the debt is the principal thing and the mortgage a mere incident.

Fourth. That when the debt, the principal thing, is paid, released, discharged or barred by the statute of limitations, the mortgage, the incident, is also gone, and the mortgagee's title is extinguished by operation of law,

and the title of the mortgagor to the land mortgaged freed from the lien.

Fifth. That a foreclosure of the mortgage by a decree in chancery, followed by a sale of the premises under the decree, the foreclosure and sale being valid, extinguishes the mortgage lien, discharges the land from the mortgage, and so far as the mortgage and land is concerned, operates as a payment of the debt.

Sixth. That the relations, which the purchaser at the foreclosure sale, whether he be the mortgagee, *cestui que trust*, or a stranger, sustains to the premises which were mortgaged, does not depend on contract, but is a statutory relation and the only right or interest acquired by his purchase is such as the certificate of purchase gives him.

Seventh. That the only right or interest the certificate of purchaser gives the holder of it is (1) the right to receive the redemption money if redemption is made, and, if redemption be not made, (2) the right to a deed by complying with the statutory requirements, which deed, when executed, will divest the title that the mortgagor had in the premises at the time the mortgage was executed, and vest the same in the holder of the certificate of purchase to whom the deed is executed, but the certificate of purchase does not divest the title of the mortgagor, nor disturb his right to possession, which still continues in him until the deed is executed.

Eighth. When the right of the holder of certificate of purchase to a deed is lost by his own laches in sleeping upon his right to a deed until the bar of the statute is complete, he has no further right or interest in the land, either in law or equity.

The court will find these several rules reviewed somewhat in the opinion in the case at bar, and still more fully in the opinion of the Supreme Court of Illinois, rendered the first time this case was before it, as Lightcap *v.* Bradley, found in the 186 Ill., 510, where the court reviews many of the cases, and reaffirms these rules as settled principles in the jurisprudence of the State. The statute complained of has been in force for nearly a third of a century, during which time the courts of the

State have been called upon to enforce its provision in a number of cases, some of which have reached the Supreme Court of the State, and from the first case to the last, the Supreme Court has held it to be a valid statute of limitation and applied it as such. No new construction, no new interpretation, no new application of the statute or any law of the State was given or made by the court in this case as this court will readily see by an examination of the cases cited in our brief going back as far as 1842 and even earlier.

As we understand the law laid down by this court, the construction of a State statute of limitation, and the application of the same to the case, is peculiarly within the province of the State Supreme Court, and not reviewable by this court. Bacon *v.* State of Texas, 163 U. S., 207. Neither is the construction which a State Supreme Court places upon its own judgments and decrees reviewable. Newport Light Company *v.* City of Newport, 151st U. S., 527.

In the case of Balkman *v.* Woodstock, 154 U. S., 177, it is said by this court that "no laws of the several States have been more steadfastly or more often recognized by this court from the beginning as rules of decisions in the courts of the United States than statutes of limitations as enacted by the legislature of the State, and as construed by its highest court." And again in Suydam *v.* Williams, speaking through Mr. Justice Campbell, this court says: "Every sovereign has the exclusive right to command within its territory and the laws which originate rights to real property are commands addressed to the members of the State, requiring them to abstain from interference with the property rights they recognize or establish, and in respect to this subject the sovereignty of a State, has not been impaired by her adoption of the Federal Constitution. The power to establish Federal courts and to endow them with jurisdiction to determine controversies between certain parties, afford no pretext for abrogating any established law of property or for removing any obligation of her citizens to submit to the rule of the local sovereign."

REVIEW OF PLAINTIFF'S CITATIONS.

In order to determine what application if any a case, cited as authority, has upon the questions involved in the case in which it is used we must understand the facts in the authority, and what was decided and what point the court was talking to in deciding the case so that we will not be led into taking some expressions of the court and twist them into applying to another case where another and different state of facts exist not at all like the case cited, and where a different set of principles apply. Keeping this in view, we will briefly review some of the authorities cited by plaintiff in error and such as will give the court a fair understanding of the cases relied upon by her counsel.

The case of Bronson *v.* Kinzie, 1 How., 311, was a case where a mortgage was given on land in Illinois in 1838. At the time the mortgage was executed there was no law allowing time for redemption of the premises from a sale under a foreclosure of the mortgage, nor any appraisement of the land required, but the purchaser was entitled to a deed and possession of the premises at once. Subsequently, in 1841, the legislature passed an act in effect allowing twelve months in which the mortgagor had the right to redeem from the sale and his judgment creditors three months thereafter; also providing for the appraisement of the land by three householders and that no sale should be made for less than two-thirds its appraised value, and extended the act so that it embraced a sale under a decree of the mortgage in controversy in the suit. It will be observed that during all of the time allowed for redemption the mortgagor had the right to remain in possession of the property and receive the rents and profits free and that there could be no sale for less than two-thirds of its appraised value. In March, 1841, Bronson filed his bill in the United States Circuit Court of Illinois to foreclose the mortgage. In June, 1841, after the law was passed, the federal circuit court adopted a rule substantially embracing the provisions of the statute of 1841. The bill filed by Bronson came

on for hearing at the December term, 1841, and the complainant moved the court for a final decree of strict foreclosure of said mortgage, or that the mortgaged premises should be sold to the highest bidder without being subject to said rule, or the act of the legislature. The motion was resisted and the judges were divided in their opinion on the following points:

"1st. Whether the decree in the case should be so entered as to direct a sale of the said mortgaged premises according to the said statute of the State of Illinois, above mentioned, or whether the same premises should be sold at public auction to the highest bidder without regard to said law.

"2d. Whether the decree in the case shall or shall not direct the sale of the mortgaged premises without being first valued by three householders and without requiring two-thirds of the amount said valuation to be bid according to the said act of the State of Illinois.

"3d. Whether the terms of the mortgage in this case do or do not require it to be excepted from the operation of the rule above recited."

And the cause with said points was certified to this court, and the court held the law unconstitutional, but in doing so the court said:

"If the laws of the State passed afterwards had done nothing more than changed the remedy on contracts of this description, they would be liable to no constitutional objection. For undoubtedly a State may, at pleasure, regulate the modes of procedure in its court in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture or the tools of a mechanic or articles of necessity in household furniture shall, like wearing apparel, not be liable to execution on judgments. Regulations of this character have always been considered in every civilized community as properly belonging to the remedy to be exercised or not by every sovereignty according to its own views of policy and

humanity. It must reside in every State to enable it to secure its citizens from unjust or harassing litigation and to protect them in those pursuits which are necessary to the existence and wellbeing of every community. And although a new remedy may be deemed less convenient that the old one, and may in some degree render the recovery of the debt more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs to the remedy may be altered according to the will of the State, providing the alteration does not impair the obligation of the contract.

Barnitz *v.* Beverly, 163 U. S., 118, is very much such a case as Bronson *v.* Kinzie. In the Barnitz case, the notes and mortgage were given in 1865, default having been made in January, 1893, Barnitz, the mortgagor, commenced proceedings to collect his claim and foreclosed the mortgage. On July 7, 1893, a judgment was rendered against the mortgagor, and other defendants, for a foreclosure of the mortgage and sale of the premises. Appraisement having been waived, the judgment, pursuing the laws of Kansas, provided for a stay of execution for six months. On January 9, 1894, an order of sale was issued under which the premises were sold February 12, 1894. On February 26, 1894, the motion for the confirmation of the sale came on for a hearing and Beverly appeared and claimed to be the owner of the premises, by conveyance subsequent to the mortgage, and resisted the confirmation, insisting that the purchaser was only entitled to a certificate of purchase under the law of Kansas, passed in 1893, which gave eighteen months in which to redeem and postponed the purchaser's right to immediate deed and possession, and also prohibiting a second sale of the property under any circumstances for any deficiency. Beverly was defeated in the lower court and appealed to the Supreme Court of the State, which affirmed the judgment of the lower court, on the ground that the statute did not apply to contracts made before its passage because it impaired the obligation. A change in

the membership of the court took place, and a rehearing was had, and on the rehearing the court held the statute did apply and was valid, and the case was brought to this court, and this court, under the facts in these cases, held the law was unconstitutional. In doing so the court said (p. 130) "the act carves out for the mortgagor, or the owner of the mortgaged property, an estate of several months more than was obtainable by him under the former law, with full right of possession, and without paying rent or accounting for profits in the meantime, what was sold under this act was not the estate pledged but a remainder, an estate subject to the possession, for eighteen months, of another person who is under no obligation to pay rent or to account for profit."

And the court puts the question: "Where in a mortgage an entire estate is pledged for the payment of a debt with right to sell the mortgaged premises, freed from redemption, can that be valid legislation, which would seek to substitute a right to sell the premises subject to an estate or right of possession in the debtor or his assignees for eighteen months?"

We submit that neither of these cases have any application to the case at bar. There is no analogy between a statute of limitation such as we are considering in this case, and a statute which carves out of mortgaged premises, a separate estate of substantial duration, and gives it to the mortgagor after the mortgage is given, as was done in Bronson *v.* Kinzie and Barnitz *v.* Beverly.

Carroll *v.* Ballance, 26 Ill., 9, 16, 17, was an ejectment. The only questions before the court were these, we quote the language of the court in its opinion as declared by Mr. Justice Breese: "The questions presented by this record are: Can a mortgagee, the mortgage debt being payable by installments, for which separate notes are given, recover the mortgaged premises in ejectment against the mortgagor, or those claiming under him. When one or more of the notes are due and unpaid, and without notice to quit to the party

in possession before action brought" and the court ver
properly held that it could, and it was to those ques
tions alone the court was speaking.

Chickering *v.* Failes, 26 Ill., 507, was a bill filed b
the appellants against appellees to redeem from tw
certain mortgages. There had been a strict foreclosur
and to understand the application of the quotatio
from the opinion of the court which counsel for plain
tiff in error have made, they should have stated wha
point the court was talking to. That portion of th
opinion immediately proceeding what they quote, read
as follows (p. 519):

"It is, however, urged with much earnestness, tha
the mortgage and the *decree of strict* foreclosure ar
color of title, which, with seven years' payment o
taxes, operates as a bar to the redemption. In proceed
ings in chancery, the statute may be interposed an
relied upon, as in action at law. While it is only i
analogy to the law, yet it, in the same manner and t
the same extent, follows the law in its application
*Then is a mortgage and decree of strict foreclosure colo
of title?*"

Now it is in answer to this question that the cour
uses the language quoted by opposing counsel, and th
court did not say nor intend to be understood, that
mere mortgage constituted such color of title, as i
required by the seven year limitation law. But ther
can be no doubt about it when it is followed by a decre
of strict foreclosure. A mortgage as such is not colo
of title. See Robbins et al. *v.* Morse, 129 Ill., 30.

Mulvoy *v.* Gibbons, 87 Ill., 367, 382, was a proceedin
instituted under the Burnt Record act, and what th
court was discussing in that part of the opinion quoted
related also to a decree of strict foreclosure, as will b
seen by what immediately precedes the quotation
Many of the other authorities cited are cases where th
court was talking in reference to decrees of strict fore
closures and such cases are not and can not be author
ity in a cause like the one at bar. The effect of a decre
of strict foreclosure is to vest absolutely, the property o
the mortgagor in the mortgagee.

Williams *v.* Brunton, 3 Gilm., 600, 622-3, was ejectment by Williams *v.* Brunton. A recovery had been had in the case. Then one King, by his attorneys, came in and moved the court to set aside the judgment and be let in to defend as sustaining such relations to Brunton that he had a right to be substituted in the place of Brunton. The court granted the motion, and ordered the plaintiff to join issue, which he refused to do. The case was tried, the defendant found not guilty, and judgment rendered and an appeal taken to the Supreme Court.

King was the mortgagee of the land from one Walker, and Brunton was grantee from Walker of the land subsequent to the mortgage. King had obtained judgment and an order for the sale of the land by *scire facias* proceedings, but no sale had been made? Williams insisted, that a merger had taken place by the *scire facias* proceedings so that King had no right to the possession of the land. While the attorneys for King insisted that the judgment in the *scire facias* of its own efficacy *without sale*, or *deed*, did not disturb or drown the lien created by the mortgage. And the court held that the mere obtaining of a judgment or decree did not extinguish the lien.

The court will observe, that this was a suit at law, for the sale of the land by *scire facias* under the statute, and not a foreclosure proceeding where the rule would be different, besides *no sale* had taken place, and it was nowhere contended or claimed, but what if a sale had taken place under the judgment that would have been the end of the lien and estate of the mortgagee.

Kruse *v.* Scripps, 11 Ill., 98, 104.

The plaintiff in this case derived title through a mortgage from Smith. The mortgage was foreclosed by *scire facias* the land sold, Kruse became the purchaser at the sale and received a sheriff's deed. Scripps derived title from a common source subsequent to the giving and recording of the mortgage, and the objection was made.

1st. That the description of the land in the mortgage was uncertain.

2d. That the mortgage was merged in the judgment in the *scire facias* proceedings and therefore could not be used as a link in the chain of title, and

3d. That the defendant was entitled to notice to quit, and the court held,

1st. That the land was sufficiently described.

2d. That the plaintiff might show that he derived title through the mortgage, and the mortgagee might be used for that purpose, and

3d. That defendant was not entitled to notice.

The case of Irving *v.* Brownell, 11 Ill., 402, was overruled by the case of Woodward *v.* Blanchard, 16 Ill., 425, and was held to be overruled in Rawson *v.* Fox, 65 Ill., 200, 207.

Collins *v.* Smith, 18 Ill., 160:

The question was whether in deraigning title through an administrator's sale of real estate and deed, made under an order of sale to pay debts, it was competent to prove by parole evidence a resulting trust by showing the purchase money belonged to Joseph, Wm., and Samuel McClintock, and that Thomas McClintock, who bid off the land, paid the money and received the deed, was acting as their agent, and if that could be done, whether the *cestui que trust* had such an equitable title deducable of record, as required by the statute.

Martin *v.* Judd, 81 Ill., 488:

Was an ejectment suit where the plaintiff title was a sheriff's deed by virtue of a sale of the land on execution against one who had a connected title of record to the premises from the United States. The defendant also derived his title through a subsequent sale, on another execution, issued on a junior judgment and a sheriff's deed, in pursuance of such sale, and the question was whether the defendant had a connected title in law deducable of record from the United States within the meaning of the Act of 1835, and the court held he did, and we do not see how it could have been held otherwise. It certainly was a good *prima facie* title and he could have recovered in ejectment, unless a bet-

ter title was shown, but there is no analogy between that case and the case at bar.

Chappell *v.* McKnight, 108 Ill., 570, 575:

In this case the court decides that although a contract for the purchase of land may be legal and binding, yet it does not follow that the vendee may enter into possession without an agreement with the vendor authorizing him to enter. *A mere contract or covenant* to convey at a future time on the purchaser performing certain acts does not create an equitable title. It is but an agreement which may ripen into an equitable title, and it is not until all the acts are performed which entitles him to a deed he has an equitable title, and may compel a conveyance. "When a purchaser is in a position to compel a conveyance by a bill in chancery, he then holds the equitable title."

Without consuming more of the court's time in reviewing authorities, we respectfully submit that the Supreme Court of Illinois made no error in its decision and that its judgment should be affirmed, or the writ dismissed in accordance with the practice of this court.

GEO. W. WALL,
E. A. WALLACE,
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For Defendant in Error.